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SHAW V. *RENO* AND THE REAL WORLD OF REDISTRICTING AND REPRESENTATION

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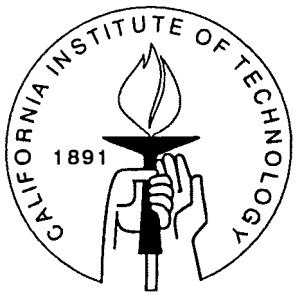

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Abstract

Justice O'Connor's majority opinion in the 1993 U.S. Supreme Court case of *Shaw* v. *Reno* has widely been seen as withdrawing judicial protection of minority voting rights -- a welcome development to those who believe as a matter of faith that discriminatory electoral rules, racist appeals in elections, and racially polarized voting are things of the distant past, but less hopeful to close students of redistricting and election campaigns of the last two decades. Deeply ambiguous, the opinion has spawned a wide range of interpretations, from assertions that it bans redistricters from taking the race of voters into account at all, even when they place them in majority-white districts, to contentions that it merely asks for further information about the basis for establishing certain "ugly" districts that have majorities of African-Americans or Latinos.

In this paper, which is based on research that I carried out for *Shaw* v. *Hunt*, the remand version of *Shaw* v. *Reno*, and *Vera* v. *Richards*, its Texas counterpart, I try to restore a sense of reality to the often factually incorrect assertions or implications of Justice O'Connor's opinion, not only by a close textual reading of the briefs and opinions in the Supreme Court case, but also by looking in considerable detail at the actual redistricting processes in North Carolina and Texas during the 1970s, 80s, and 90s. Were race, partisanship, and individual politicians' interests taken into account in redrawing districts before 1991, or were all previous reapportionments pristine exercises in civic virtue? Might the states in the 1990s have had compelling interests in redressing past racially discriminatory practices? Were the motives of the 1991-92 redistrictings so uncomplicated that they can be easily and unambiguously determined by a quick glance at a map? For North Carolina, I also examine whether white and black public opinion and the voting records of white and black members of Congress differ systematically from each other. Do black voters need black faces to represent them?

Shaw's vagueness affords the Supreme Court the possibility of gracefully backing away from its separate but unequal standards, standards that allow whites standing to sue without having to prove that the electoral rules at issue have a racially discriminatory effect and without having to show in detail that they were adopted with a racially discriminatory intent. In the final section, I outline five escape routes from *Shaw*, all of which are based on its factual inadequacies.

TABLE OF CONTENTS

SHAW V. *RENO* AND THE REAL WORLD OF REDISTRICTING AND REPRESENTATION

I. INTRODUCTION

Justice Sandra Day O'Connor's majority opinion in *Shaw* v. *Reno*[1] has widely been seen as a radical departure from precedents, an indication that strengthening minority voting rights is no longer the only achievement of the Second Reconstruction safe from congressional or judicial attack.[2] It is true that the abstract, deeply ambiguous, and often unreflective opinion suggested only vague and unworkable standards that have led to much-heightened judicial intrusion into the political process,[3] and that it encouraged a cruelly ironic interpretation of the Fourteenth and Fifteenth Amendments, an interpretation surely unintended by their framers, that aims to undermine the sharpest minority gains in politics since the First Reconstruction. In this paper, however, I will argue that the fears of liberals and the hopes of opponents of the voting rights revolution have been exaggerated. Many of the problems of the *Shaw* opinion stem from the inadequate factual and legal record before the Court in 1993, particularly from its departure from the reality of redistricting and representation, past and present.[4] The way to avoid the extreme consequences that have sometimes been predicted to flow from *Shaw* is to restore a dose of that reality. That restored, *Shaw*'s apparent separate and unequal

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[1]113 S.Ct. 2816 (1993).

[2]Laughlin McDonald, "Voting Rights and the Court: Drawing the Lines," 15 *Southern Changes* 1 (Fall, 1993); T. Alexander Aleinikoff and Samuel Issacharoff, "Race and Redistricting: Drawing Constitutional Lines After *Shaw* v. *Reno*," 92 *Mich. L.R.* 588 (1993); Kimberley V. Mann, "*Shaw* v. *Reno*: A Grim Foreboding for Minority Voting Rights," 5 *Md. Jl. of Contemp. Legal Issues* 147 (1993-94); Pamela S. Karlan, "End of the Second Reconstruction?" *The Nation* (May 23, 1994), 698-700; A. Leon Higginbotham, Gregory A. Clarick, and Marcella David, "*Shaw* v. *Reno*: A Mirage of Good Intentions With Devastating Racial Consequences," 62 *Fordham L.R.* 1593 (1994); Jonathan M. Sperling, "Equal Protection and Race-Conscious Reapportionment: *Shaw* v. *Reno*," 17 *Harvard J. Law & Public Policy* 283 (1994); Anthony Q. Fletcher, "Recent Development," 29 *Harvard CR-CL L.R.* 231 (1994).

[3]*Shaw* has also damaged an administrative procedure, oversight by the Department of Justice under Section 5 of the Voting Rights Act, that, along with private litigation, has been working rather smoothly to foster the rights of discrete and insular minorities, has been reasonably free of partisanship, and has become, over the years, quite efficient. See Drew S. Days III, "Section 5 and the Role of the Justice Department," in Bernard Grofman and Chandler Davidson, eds., *Controversies in Minority Voting: The Voting Rights Act in Perspective* (Washington: Brookings Institution, 1992), at 52-65. Conservative judicial activism, in this instance, is poor administration, needlessly expensive and time-consuming.

[4]Cf. Aleinikoff and Issacharoff, *supra*, n.2, at 612.

standard, a standard that gives whites rights that blacks and browns[5] do not equally enjoy, may fairly easily be reconsidered and the issue of race and redistricting may be folded back again into the main line of vote dilution cases.

After offering an interpretation of O'Connor's opinion in Section II, I will turn in Sections III and IV to the recent history of redistricting in North Carolina and Texas, drawing on my research for the NAACP Legal Defense and Education Fund in the remand case of *Shaw* v. *Hunt*[6] and for the U.S. Department of Justice in the analogous Texas case, *Vera* v. *Richards*.[7] This excursion into political reality has three purposes. The first is to test the validity of what economists would call the "stylized facts" that undergird O'Connor's opinion: The Justice seems to assume that the beliefs and opinions of African-Americans are generally the same as those of whites, or if not, that white members of Congress from districts with large proportions of blacks so closely represent black attitudes that there is no need for black representation. If black and white attitudes are indistinguishable, or if white members of Congress, or at least white Democrats vote in the same way that black members of Congress do, then enabling black voters to elect candidates of their choice has merely symbolic importance. Black interests would not be different from white interests or at least they would not need to be represented by black faces, in the words of a recent book title by a conservative political scientist.[8] A second stylized fact alleged by the North Carolina and Texas plaintiffs is that voting is no longer racially polarized, that whites in these states freely and quite frequently cast ballots for black candidates when they are adequately funded and qualified, and that campaigns are not marred by racial appeals.[9] If experience shows that the political system was not previously biased against blacks in the

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[5]The conventions on racial designations are in flux. To avoid tiresome repetition, I will use the terms "African-American" and "black" interchangeably, and likewise, the terms "Latino," "Hispanic," and "Mexican-American." To avoid confusion, in the Texas portion of the paper, non-Hispanic whites will be called "Anglos."

[6]861 F.Supp. 408 (E.D. N.C. 1994). The discussion of the facts of historical discrimination, on which Judges Phillips and Britt partially relied in upholding the 1st and 12th Congressional Districts, is very briefly summarized in their opinion, at pp. 462-65.

[7]861 F.Supp. 1304 (S.D. TX. 1984).

[8]Carol Swain, *Black Faces, Black Interests: The Representation of African Americans in Congress* (Cambridge, MA: Harvard Univ. Press, 1993).

[9]Robinson O. Everett, "Appellants' Brief on the Merits," *Shaw* v. *Barr* (U.S Supreme Court appeal of federal district court case), at 42-43; Mark Horvit and Jay Root, "Suit challenges congressional districts," *Houston Post*, Jan. 28, 1994, p.A-25. O'Connor repeats, but does not endorse these factual claims. *Shaw* v. *Reno*, at 2831. If no black candidate had run because everyone recognized that the chances of a black winning were infinitesimal, the system would in fact be even more discriminatory than if some African Americans ran and lost. It is sometimes possible to verify this state of affairs through statements by potential candidates or knowlegeable political observers. See

state, then drawing districts in a race-conscious manner in 1991-92 granted them an unnecessary special privilege, unnecessary because they could compete equally anyway, and special because no white politician needed or received districts tailored for them. Color-blind districts would then be appropriate for a color-blind state. A third stylized fact, apparently embraced by O'Connor, is that each state has previously followed what the *Raleigh News and Observer* in 1991 called the "basic criteria [that] haven't changed in 200 years: to make each district as compact as possible, as contiguous as possible, and as reflective as possible of common interests."[10] Have compactness, contiguity, the recognition of all "communities of interest" (including those of minority ethnic groups), non-partisanship, and indifference to the protection of incumbents been the "traditional districting principles" in North Carolina and Texas, and did the 1991-92 line-drawings represent radical changes from past practices, unprecedented corruptions of a previously unbroken devotion to the principles of civics textbooks? If so, then the evil would stand out, would condemn itself. There would be no reason for the state to remedy past discrimination or to fear that a court might overturn a continuation of the same districting policies that the state had always used, because there would have been no discrimination, and thus no excuse for a remedy -- no compelling state interests, just special interests.

This contrast of real with idealized "traditional districting principles" will fulfill the second major purpose of the paper: to examine whether North Carolina and Texas had two "compelling state interests" for race-conscious districting -- to remedy their history of discrimination and to avoid potential, well-grounded legal suits under the Voting Rights Act or the Constitution. Rather than being concerned with some vague "societal discrimination"[11] or with events primarily of the remote past, this inquiry treats the particularized and usually the recent history of racial discrimination *in redistricting*.

A third purpose is to consider whether the 1991-92 redistricters had undiluted racial motives that can be read perfectly by comparing district maps with those showing racial percentages of the population, as plaintiffs in these cases have conveniently assumed. Do shapes tell all, or all we need to know?

Social scientists, as well as judges, have long realized that redistricting in America is a mixture of the general and the particular. The general motives and constraints are the same everywhere. Redistricters try to protect incumbents or design districts for particular candidates; to help friends and harm enemies; to maximize the strength of their parties or ideological factions; and to inhibit or

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below, Section III.B.6; and *Williams* v. *City of Dallas*, 734 F.Supp. 1317 (N.D.Tex. 1990), at 1324, 1396.

[10]*Raleigh News and Observer* (hereinafter referred to as "*RN*"), editorial, "A map to boggle minds," June 1, 1991, at A12.

[11]*Wygant* v. *Jackson Bd. of Educ.*, 106 S.Ct. 1842 (1986), at 1847-48; *City of Richmond* v. *Croson*, 109 S.Ct. 706 (1989), at 724.

promote the representation of various groups, especially racial and ethnic groups.[12] They also often provide high-sounding justifications for their actions that are factually misleading or incorrect or are so illogical as to be transparently pretextual.[13] They seek to achieve their ends within a certain legal framework -- state and national constitutional and statutory requirements, such as population equality and the Voting Rights Act. They are also constrained by the technical capabilities of the time, such as the specificity of census compilations and the capacities of tabulating hardware and software.

But every such story differs so crucially in particular, often subtle details that superficial glances at the shapes and demographic statistics of districts may be quite misleading, whether performed by expert witnesses, attorneys, law clerks, or judges. To paraphrase Justice O'Connor's opinion, shapes are one area in which details do matter.[14]

In a short Section V, I will argue that "race blind" or absolute or partial compactness standards are unworkable, unrealistic, and/or racially unequal in their effects and propose a return to traditional dilution case standards, a return that the Supreme Court appeared to be heading toward in its June, 1994 decisions of *Johnson* v. *DeGrandy*[15] and *Holder* v. *Hall.*[16]

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[12]Perhaps the best introduction to reapportionment is Bruce E. Cain, *The Reapportionment Puzzle* (Berkeley, CA: Univ. of California Press, 1984).

[13]Thus, a Republican redistricting consultant in California defended a decision to decrease the Latino percentage in a marginally Latino congressional district on the grounds that preserving the high Latino percentage would require splitting the unincorporated "Koreatown" area in the City of Los Angeles. He failed to note that his plan did, in fact, split Koreatown in half, and that the percentage of Koreans who actually lived there and were registered to vote was negligible -- much less than the proportion of Latinos that the plan cut out of the district. For more details, see my unpublished paper, "Reapportionment Wars: The Beginning and End of Politics in California?" (mimeo., Calif. Institute of Technology, August, 1993), at p. 64.

[14]*Shaw* v. *Reno*, at 2827 (". . . reapportionment is one area in which appearances do matter.")

[15]62 LW 4755 (1994). There are four very important things to note about this case. First, the majority opinion by Justice Souter, who dissented in *Shaw*, treats vote dilution law as if *Shaw* did not exist, remarking, for instance, that "the lesson of *Gingles* is that society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity . . . " (p. 4762). Note that he does not say that such districts can never be drawn, or that they must fit some definition of compactness. Second, he does not cite *Shaw* at all, which is particularly noticeable because *Shaw* pervades Justice Kennedy's concurrence. Third, Rehnquist and O'Connor, two members of the *Shaw* majority, joined Souter's opinion, and not just his judgment. If they had agreed with the outcome, but wished to associate themselves with *Shaw* to a greater extent, they could have signed on to Kennedy's concurrence. Fourth, Justice Thomas, joined by Justice Scalia, wrote a radical and remarkable dissent in *Holder* v. *Hall*, which he incorporated in a short dissent in *DeGrandy*, that repudiated 25 years of the history of the Voting Rights Act by claiming that it should not apply to electoral structures at all. If Thomas and Scalia were sure that a stable *Shaw* majority took the radical view of that opinion that some lower courts and lawyers for white plaintiffs in *Shaw*-type cases have, there would be no necessity to engage in a blatant falsification of legislative history in an opinion that has a desperate and despairing edge to it.

II. A HARMLESS SUIT

A. *Shaw* Barred

The *Shaw* saga began after the state of North Carolina, which had not sent an African-American to Congress since 1898, drew two bare-majority black congressional districts in 1991-92, for reasons that will be explained in more detail in Section III, below. The rural First District sprawled over a good deal of eastern North Carolina, while the urban Twelfth tracked Interstate-85 for 160 miles from Charlotte to Durham. Led by Robinson Everett, a Duke University law professor who was both chief attorney in the case and, along with his son, a plaintiff, five white people from Durham, three of whom lived in neither the First nor the Twelfth Districts, filed suit in federal court, charging that the legislature, under pressure from the U.S. Department of Justice, had perpetuated a "racial gerrymander" that infringed their right "to participate in a process for electing members of the House of Representatives which is color-blind and wherein the right to vote is not abridged on account of the race or color of the voters."[17] They also claimed to speak for all North Carolinians of every race.[18]

Judges J. Dickson Phillips, Jr. and W. Earl Britt of a three-judge federal court in North Carolina dismissed claims against both federal and state defendants on the grounds that the plaintiffs had proven neither a discriminatory purpose nor a discriminatory effect, and that therefore, according to specific constitutional provisions and previous vote dilution precedents, they had failed "to state a claim under which relief can be granted." Not only did *United Jewish Organizations, Inc.* v. *Carey* (hereinafter

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[16]62 LW 4728 (1994).

[17]Everett, *supra*, note 6, at 15.

[18]*Shaw* v. *Barr*, 808 F.Supp. 461, 470 (E.D.N.C. 1992). In a classic "kitchen sink" brief, the plaintiffs challenged the action not only under the Fifteenth Amendment and the equal protection clause of the Fourteenth Amendment, but also under Article I, Sections 2 and 4, and under the privileges or immunities clause of the Fourteenth. They claimed that mention of "the people" in Art. I, Sec. 2 implied that "the people" could not be divided on racial grounds, that Art. I, Sec. 4's grant of control over the "times, places and manner of holding elections" to state legislatures implied that all federal control was illegal, and that color-blind voting was a "privilege" guaranteed by the privileges or immunities clause. Such unprecedented, quirky arguments have typified plaintiffs' attorneys, none of whom is experienced in voting rights law, in this whole series of cases. In *Vera* v. *Richards*, attorney Paul Hurd contended that taking *political* consequences into account in a redistricting was unconstitutional -- a suggestion that could only have brought derisive laughter from two centuries of politicians.

UJO), 430 U.S. 144 (1977), in Phillips's view, squarely decide the issue,[19] but the fact that blacks comprised only a small proportion of the legislature virtually foreclosed a case of invidious racial intent and the fact that even if they won two of the twelve seats, African-Americans would have less than proportional statewide representation in Congress, made it impossible to demonstrate a discriminatory effect.[20]

Although agreeing with the majority that the case against the federal defendants should be dismissed and that race-conscious districting *per se* was not unconstitutional, Judge Richard Vorhees thought that *UJO* allowed such districting only if lines followed what he characterized as the "time-honored, constitutional concepts . . . such as contiguity, compactness, communities of interest, residential patterns, and population equality." Plaintiffs might, he thought, be able to prove at a full trial that there had been discrimination against black voters who had not been included in the First or

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[19]430 U.S. 144 (1977). In a 7-1 decision, with Justice Marshall taking no part in the case, the Supreme Court in *UJO* squarely rejected the sorts of contentions raised by the *Shaw* plaintiffs. Allegations, but not, apparently, extensive proof of racial bloc voting and past purposeful racial discrimination against African-Americans in drawing lines in the Bedford-Stuyvesant area of New York City were enough to convince every judge except Chief Justice Burger to reject the claim of Hasidic Jews that their community had been unconstitutionally split by the New York legislature, in response to a Section 5 ruling by the U.S. Department of Justice, in order to create new state legislative districts for African Americans and Puerto Ricans. In the prevailing opinion in *UJO*, Justice White, who harshly dissented in *Shaw* v. *Reno*, recognized the reality of racial bloc voting and the consequent likelihood of representation by a member of the race that is in a majority in a particular district, held that the purposeful use of race in redistricting was legal unless it was used to stigmatize members of a particular group, and noted that the whites who were in the majority nonwhite districts still enjoyed an equal right to vote. *UJO*, at 1010. Concurrences by Brennan and Stewart emphasized that a desire to comply with the Voting Rights Act shielded the state legislative action from attack as a purposefully discriminatory action. Only Burger's singleton dissent accepted the propositions (without citing any evidence) that racial bloc voting was a thing of the past and that a political melting pot was constitutionally required (except in the case of Hasidic Jews, which he thought had a right not to be split between districts). *Id*, at 1020-21. Only one sentence in Justice White's opinion links the majority in *UJO* to that in *Shaw* v. *Reno*: ". . . we think it also permissible for a State, employing sound districting principles such as compactness and population equality, to attempt to prevent racial minorities from being repeatedly outvoted by creating districts that will afford fair representation to the members of those racial groups who are sufficiently numerous and whose residential patterns afford the opportunity of creating districts in which they will be in the majority." *Id*., at 1011. Although he did not specifically refer to that sentence in *Shaw*, Justice White did reject it by implication when he remarked, at 2841, that "district irregularities . . . have no bearing on whether the plan ultimately is found to violate the Constitution." Justice O'Connor's attempt in *Shaw* to distinguish *UJO* on two grounds, White's sentence and the fact that the North Carolina plaintiffs claimed that the legislature's sole purpose was to "segregate" voters is especially ironic, since in fact the degree of segregation in the New York districts was greater than in those of North Carolina -- 65% and 67.5% nonwhite in New York, compared to 57% in North Carolina. Moreover, by traditional rules of standing, the Hasidic Jews, surely a socially distinctive community, had a much better claim than the *Shaw* plaintiffs, since the New Yorkers asserted that they were damaged by the district lines.

[20]Id., quote at 473.

Twelfth Districts or white voters who had not been excluded from them.[21] Operating fully within the tradition of vote dilution litigation, Vorhees called for a trial to give plaintiffs a chance to prove "invidious discrimination against majority race voters." The rough statewide proportionality between the percentage of blacks in the population and the percentage of "minority opportunity districts"[22] in Congress had to be balanced against what he asserted to be the facts that blacks and whites who lived in the same areas "share the same interests and concerns," and that there was no racially polarized voting, enabling them to "elect a mutually agreeable Representative, irrespective of race."[23]

B. An Appealing Fantasy

Because the three-judge panel held no hearing on the facts of North Carolina politics or redistricting, the *Shaw* appellants were free to construct a fictitious, false, "colorblind" picture of the state's past and present, and to make utterly unevidenced assertions about social psychology, and the Supreme Court had no concrete reason to doubt any of it. *Shaw* v. *Reno* was thus argued and decided in a storybook atmosphere in which the Justices' inclinations were given free sway because they were not restrained by any considerations of reality. The Court even seemed unaware of the proportion of African-Americans in the First and Twelfth Districts -- 57% in the whole population, 53% in the voting age population, and 51-54% of the registered voters. Justice O'Connor's opinion avoided all mention of the matter and Justice White's dissent reported the black proportion of registered voters, but not people in the Twelfth District, and then made nothing of the fact that the white and black populations there were nearly equal, not "segregated."[24]

Thus, in his appeal brief, Robinson Everett claimed that "No court or agency has determined that racial discrimination has ever occurred in the creation of congressional districts in North Carolina.

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[21]In light of O'Connor's emphasis on "segregation" in *Shaw* v. *Reno*, it is noteworthy that Vorhees's criticism here was that there was *too little* segregation, *not enough* apartheid in the districts as drawn.

[22]This is a term of art, not used in Vorhees's or O'Connor's opinions, that emphasizes that minorities may not be able to elect the candidate that they prefer in such a district; that even if elected, the candidate herself is not guaranteed to be a member of the minority; and that, depending on the degree of Anglo and other minority crossover voting, the district need not contain any particular percentage of minority voters, adults, or total persons. In some circumstances, 50% may be more than enough; in others, 70% may be too few for a particular minority to have an equal opportunity with Anglos to elect a candidate of choice. See Kousser, "Beyond *Gingles*: Influence Districts and the Pragmatic Tradition in Voting Rights Law," 27 U.S.F.L.R. 551 (1993).

[23]Id., quotes at 476-77.

[24]*Shaw* v. *Reno*, at 2840, n. 7. The Appendix of the appeal brief by the state of North Carolina and Appendix D of the Justice Department's appeal brief had the correct figures for the population and the voting-age population. Registered voter percentages were provided to me by the state during the *Shaw* v. *Hunt* litigation.

Indeed, it is clear that none has taken place; and so there was no constitutional violation to be remedied by establishing two majority-minority districts."[25] As Section III of this paper will show, both factual assertions are false, and, since several of the plaintiffs were longtime political activists in the state, the statements must have been known to have been false at the time of the appeal. Furthermore, whites, Everett asserted, suffered an "impression of injustice"[26] because the Twelfth District was drawn to allow black voters to elect a candidate of choice, who, Everett claimed, without any evidence whatsoever, would "consider his primary duty to be the representation of blacks." Yet in a curious racial double standard, he contended that African-Americans would gain no benefit from having a responsive representative. Indeed, the action "was an implicit affront to blacks because it implied that they are incapable of organizing coalitions to elect favored candidates of whatever race" -- another statement widely known to have been false because of the nationally-watched campaigns during the 1980s in the congressional district containing the plaintiffs' Durham homes.[27] Naturally, Everett did not suggest that all of his amateur psychology could be reversed by substituting the opposite race in each statement, but merely satisfied himself with asserting that any districts drawn "because of compactness, contiguousness, geographical boundaries, community of interest, or other factors" could not have had a discriminatory intent, whatever the racial effects of the lines.[28] Any evidence of legislators' motives for drawing such districts was apparently not only presently absent from the record, it was presumptively irrelevant, even if, say, legislators admitted and the media reported that they drew such districts with a racially invidious intent. In other words, facts could be invented as needed or dismissed if inconvenient.

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[25]Everett, *supra*, note XX, at p. 19. Similar assertions are made on p.58.

[26]Everett made no effort to determine how widespread such an "impression" was, how important it was to each person, or exactly what caused it, if it existed, and he never attempted to weigh it against any analogous impression that African-Americans may have had at previously or prospectively being denied any congressional representation at all by persons of their race. This might be contrasted with the new industry that has sprung up since 1989 to perform excruciatingly detailed "*Croson* studies" to justify affirmative action programs.

[27]After extensive evidence to the contrary had been presented in *Shaw* v. *Hunt* (Tables of Dr. Richard Engstrom, Exhibit 21 to Defendant's Memorandum in Opposition to Preliminary Injunction Motion), the plaintiffs continued to maintain that African-American candidates could be elected from overwhelmingly majority-white districts in contemporary North Carolina. Even if there were any justification for this wishful thinking, it confuses the preferences of the voters, which is the object of constitutional concern, with the race of the candidates, which is important only as a reflection of the electorate's preferences. Robinson Everett, "Plaintiff's Memorandum in Support of Response in Opposition to the Motion of the United States for Leave to Participate as Amicus Curiae," in *Shaw* v. *Hunt*.

[28]Id., at 42-45, 75-76.

Everett believed that the Constitution prohibited any race-conscious districting at all, whether performed by the state on its own or under the rubric of the Voting Rights Act.[29] An *amicus* brief by the Republican National Committee (hereinafter "RNC"), an organization that later gained representation as plaintiff-intervenor in the remand case of *Shaw* v. *Hunt*, took a strongly contradictory stance, one that continues to bedevil "conservatives" in this whole controversy. Simply put, the RNC favors race-conscious districting if it hurts Democrats, but opposes it if it hurts Republicans. Thus, Everett's "color blind" principle would have prohibited the use of racial statistics to aid in drawing majority-minority districts, and he would have imposed a compactness requirement only on those districts, because only a *racially*-based criterion, he believed, offended the Constitution. Republicans, who unsuccessfully challenged both the North Carolina[30] and Texas[31] congressional redistrictings as *partisan* gerrymanders in which Democrats had allegedly only paraded a concern with racial minority interests to cover their real, partisan motives, favored allowing some race-conscious districting. As their actions in Ohio made clear,[32] Republicans were perfectly willing to pack blacks into majority/minority districts. What bothered them was allocating minority voters who were not necessary for control of a district to nearby districts in order to increase the number of legislators that minorities could influence and Democrats could elect. Section III, below, shows that Republicans in North Carolina were more than willing to draw a second sprawling district with a high proportion of minorities so long as it had the net effect of eliminating two Democratic seats. What the RNC was interested in, in other words, was electing Republicans.[33] Thus, in their *Shaw* briefs, the RNC

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[29]Everett, *supra*, note 6, at 15, 27. Justice O'Connor's opinion in *Shaw* v. *Reno*, at 2824 takes advantage of the ambiguities of Everett's brief to give it a softer impression on this point than it actually has.

[30]Pope *v.* Blue, *809 F.Supp. 392 (W.D.N.C. 1992), aff'd 113 S.Ct. 30 (Oct. 5, 1992).*

[31]*Terrazas* v. *Slagle*, 789 F.Supp. 828, at 834-35 (W.D.Tex. 1991).

[32]See *Voinovich* v. *Quilter*, 113 S.Ct. 1149 (1993); Pamela S. Karlan, "All Over the Map: The Supreme Court's Voting Rights Trilogy," 24 *Supreme Court Review* 245, at 264-70.

[33]Analogously, what Professors Daniel D. Polsby and Robert D. Popper are interested in, by favoring a constitutional compactness standard for all districts in "Ugly: An Inquiry into the Problem of Racial Gerrymandering Under the Voting Rights Act," 92 *Mich. L.R.* 652 (1993), is the election of racial "moderates" (p. 671) and white Republicans (p. 682). In the South, of course, those "moderates" would be white and as Section III.A., below, shows, they would not be very moderate. Since 1964, white Republicans throughout the country have been growingly adverse to the interests of minorities. See, e.g., Edward G. Carmines and James A. Stimson, *Issue Evolution: Race and the Transformation of American Politics* (Princeton, N.J.: Princeton Univ. Press, 1989); Robert Huckfeldt and Carol Weitzel Kohfeld, *Race and the Decline of Class in American Politics* (Urbana, IL: Univ. of Ill. Press, 1989). Polsby and Popper's revolutionary suggestion, then, could only adversely affect African-Americans and Latinos.

recycled the political gerrymandering claims from the earlier case and reused the arguments with which the Bush Administration had failed to convince Congress to pass a mandatory compactness bill to apply to the 1990s round of redistricting. Unlike Everett, the RNC wanted compactness imposed on every congressional district, whatever its racial proportion, and whether or not racial considerations played any role in setting its boundaries.[34]

Containing no more facts than the RNC's had, the *amicus* brief for the Washington Legal Foundation (hereinafter "WLF"), the Equal Opportunity Foundation, and North Carolina Sen. Jesse Helms, whose 1990 campaign against African-American Harvey Gantt was the most notoriously racist of the season, straight-facedly purported to embrace egalitarianism: "Racial gerrymandering," it intoned, "by placing the state's stamp of approval on the notion that people of different races are inherently different from one another -- is a giant step backward from our goal of a color-blind society." Whites who lived in black-majority districts, the WLF declared, "have effectively been disenfranchised," and since the number of congressional districts that white voters in the state could absolutely control had dropped from eleven to ten,[35] whites throughout the state had also been damaged. Nor could the State legally claim to have drawn majority-minority seats on the grounds that otherwise, it would have faced a Section 2 or equal protection clause suit. Even if the state had knowingly drawn twelve majority-white districts, under *Feeney*,[36] the WLF asserted, potential opponents would still have to prove that it had done so "because of" race. Any compact district, the WLF believed, would be "largely immune" to such a challenge.[37] Whatever its effect on blacks, "color blindness," as the WLF employed it, certainly seemed to protect against any decrease in the power of whites.

The State of North Carolina and the Justice Department, along with the State of Florida, the Democratic National Committee, and a group of liberal legal organizations, as *amici*, neither contested

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[34]Michael A. Hess, appeal brief for RNC in *Shaw* v. *Barr*, at 1-10, 23-24. Although there has never been a good empirical study on the subject, Republican and Democratic redistricting experts agree that because the most loyal Democrats (blacks, Hispanics, Jews, and lower income voters in general) seem to be more geographically segregated than Republican voters are, compact districts would tend to minimize the number of seats Democrats win. See, e.g., Daniel Hays Lowenstein and Jonathan Steinberg, "The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?" 33 *U.C.L.A.L.R.* 1 (1985).

[35]As a result of population growth, North Carolina's congressional allocation had risen from eleven to twelve after the 1990 census.

[36]*Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979).

[37]Washington Legal Foundation, Equal Opportunity Foundation, and Jesse Helms, appeal brief in *Shaw* v. *Barr*, at 2, 15-16, 20-21.

nor added to the factual record of the *Shaw* case on appeal,[38] contenting themselves with discussing principles and precedents, which they believed, with considerable justification, supported the position of the district court. They focused on injury to whites and racial equality before the law. Reading *Feeney* as imposing a "racial animus" standard, the state contended that since it had not meant to hurt whites by drawing two majority/minority districts, whites had no basis for an equal protection claim. Moreover, whites could freely participate in politics and could dominate elections in ten out of twelve seats, which was more than their population percentage in the state (83% vs. 77%).[39] Complying with the Voting Rights Act or trying to insure equal opportunities for minorities were legitimate reasons for race-conscious districting, and imposing a special burden of justification on minority opportunity districts would not only contradict numerous lower federal and Supreme Court decisions, but it would also undermine the Voting Rights Act, impose a racial double standard, and treat racial groups differently from other "communities of interest."[40]

From *Roberts* v. *Boston*, the nation's first well-documented school segregation case,[41] through the present, civil rights cases have been fact-intensive, inquiring into the specifics of whether schools, public accommodations, job opportunities, the chances of being convicted of crimes, the possibilities of registering, voting, or attaining office were actually inferior for African-Americans or other historically disadvantaged minorities. Not *Shaw* v. *Reno*. *Shaw* was decided in a factual vacuum.

C. "Classifications of Citizens Solely on the Basis of Race"[42]

Yet for a case that was argued on the basis of few facts, many of them wrong, *Shaw* v. *Reno* was surprisingly dependent on empirical assertions and it pointed lower court judges toward much more

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[38]A brief filed for the Lawyers' Committee on Civil Rights Under Law, the ACLU, MALDEF, and the NAACP, pp. 12-13, did refer generally to the history of racial discrimination in the state as a justification for drawing minority opportunity districts.

[39]Jefferson Powell, appeal brief for State of North Carolina, *Shaw* v. *Barr*, at 7, 17, 49.

[40]Id., at 44-45; Brief of Lawyers' Committee, *supra*, n. XX, at 4-5, 8; Brief of Bolley Johnson, Speaker of the Florida House, and Peter R. Wallace, chairman of the Florida House Reapportionment Committee, in *Shaw* v. *Barr*, at 5-6, 17; Brief of U.S. Dept. of Justice in id., at 22-23, 26; Brief of NAACP-LDF in id., at 3; Brief of Democratic National Committee in id., at 23.

[41]59 Mass. (5 Cush.) 198 (1849). For the case in context see Kousser, "'The Supremacy of Equal Rights': The Struggle Against Racial Discrimination in Antebellum Massachusetts and the Foundations of the Fourteenth Amendment," 82 *N.W.U.L.R.* 941 (1988).

[42]*Shaw* v. *Reno*, at 2824.

intensive attention to factual details in future cases. Logically, the opinion may be divided into four parts: a consideration of precedents, an analysis of legislative decisionmaking on redistricting, a public policy/constitutional argument about the evils of "racial gerrymandering," and a rather vague guide to further judicial decisionmaking on the issue.

1. A New Cause of Action

Implicitly recognizing that white plaintiffs could not prove the sort of discriminatory effect that had been required in vote dilution cases[43] and could not demonstrate that they had been harmed,[44]

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[43]In majority vote dilution cases such as *Baker* v. *Carr*, 369 U.S. 186 (1962) and *Reynolds* v. *Sims*, 377 U.S. 533 (1964), specific groups of individuals, especially white suburbanites, were underrepresented, compared to whites who lived in certain rural areas. Those who were harmed brought the cases and the injuries to them and the possibilities of judicial remedies for those injuries dominated the discussions in the cases. In minority vote dilution cases such as *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969), *White* v. *Regester*, 412 U.S. 755 (1973), and *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), plaintiffs went to considerable lengths to prove racially discriminatory effects. The focus of the Senate controversy over amending Section 2 of the Voting Rights Act in 1982 was on whether to write into the law a specific standard, proportionality, against which to measure those effects. Even where racially discriminatory intent, rather than effect, has been the crux of a case, courts have required *some* showing of effect. See *Garza* v. *Los Angeles County Board of Supervisors*, 756 F.Supp. 1298, 918 F.2d 763 (1990). O'Connor explicitly distinguishes *Shaw* from other vote dilution cases on the grounds that those cases did not involve "racial gerrymanders." *Shaw* v. *Reno*, at 2828.

[44]To Justice Scalia and three of the other four Justices who, along with Scalia, composed the majority in *Shaw* v. *Reno*, a plaintiff must demonstrate as an "irreducible constitutional minimum of standing," that he has "suffered an 'injury in fact' -- an invasion of a legally-protected interest which is (a) concrete and particularized . . . and (b) 'actual or imminent, not "conjectural" or "hypothetical."' . . . We have consistently held that a plaintiff raising only a generally available grievance about government -- claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large -- does not state an Article III case or controversy." *Lujan* v. *Defenders of Wildlife*, 112 S.Ct. 2130 (1992), at 2136, 2143. In a case in which African-American parents challenged I.R.S. tax exemptions for private segregated schools, Justice O'Connor for a six-person majority denied the parents standing because they merely claimed what she called an "abstract stigmatic injury." *Allen* v. *Wright*, 104 S.Ct. 3315 (1984), at 3327.

In affirmative action cases, such as *Wygant* v. *Jackson Bd. of Ed.*, 476 U.S. 267 and *Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, which are so heavily relied on in *Shaw*, white plaintiffs have always demonstrated injury -- loss of jobs or contracts. In this sense, *Shaw* does not "Crosonize" voting rights law. On the contrary, it reinterprets *Croson* to make it, in effect, stand for the proposition that every contractor has a right to participate in a colorblind contracting process, a right that anyone could claim, even if she won a contract, got a job, or gained admission to a law or medical school. Indeed, Ruth Shaw, the lead plaintiff in *Shaw*, voted in 1992 for Mel Watt, the successful African-American Democratic congressional candidate in the Twelfth District.

During the 1970s, some legal scholars on the left criticized the Court for denying standing "as a surrogate for disposition on the merits" and for inconsistencies in applying the doctrine. Mark V. Tushnet, "The New Law of Standing: A Plea for Abandonment," 62 Cornell L.R. 663 (1977), quote at 699; Tushnet, "The Sociology of Article III: A Response to Professor Brilmayer," 93 Harvard LR. 1698 (1980). In *Shaw* v. *Reno*, the Court majority blatantly ignored their own broadly stated standards on standing in order to get to an issue that they wanted to decide.

much less singled out for injury because they were white,[45] O'Connor recognized a new, "analytically distinct claim," a generalized injury to the political system itself, a "lasting harm to our society,"[46] that apparently anyone could assert -- that the way the state had drawn district lines amounted to a "racial classification."[47] The equal protection clause, as she glossed it, prevented "discrimination *between* individuals on the basis of race," not merely discrimination *against*[48] individuals or members of a group.[49] Under this new cause of action, plaintiffs could proceed if there was a correlation

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[45]E.g., in *Whitcomb* v. *Chavis*, 403 U.S. 755 (1973), the Supreme Court ruled that black plaintiffs had not proved that their underrepresentation was the effect of their race. Black candidates lost, the Court decided, because they were Democrats. This line of reasoning was carried furthest in Judge Higginbotham's opinion in *LULAC* v. *Clements*, cite. The only obvious way to reconcile the Fifth Circuit's opinion in *LULAC* with Judge Jones's in *Vera* v. *Richards* is to notice the race of the plaintiffs. Partisan motives explain away racial ones if black and brown Democrats allege discrimination, but partisanship may be disregarded for the benefit of white Republicans. In *Irby* v. *Fitz-Hugh*, 692 F.Supp. 610(E.D. Va. 1988), 693 F.Supp. 424 (E.D. Va. 1988), 889 F.2d 1352 (4th Cir. 1989), the judges decided that since blacks were proportionately represented on Virginia school boards, a law that was arguably adopted with a discriminatory intent had become legitimate. The authoritative Senate Report on the 1982 renewal of the Voting Rights Act stressed proof of a racially discriminatory effect. See S. Rep. No. 417, 97th Cong., 2d Sess. 28-29 (1982). Compare also O'Connor's stress on injury in her dissent in *Metro Broadcasting*, *supra*, n. X, at 3032-33 ("To the person denied an opportunity or right based on race, the classification is hardly benign.")

[46]Id., at 2832.

[47]Id, at 2830, 2824. O'Connor's exact words are that this claim could be brought by "white voters (or voters of any other race)."

[48]In dissent, Justice White, at 2836, considered the issue "whether the classification based on race discriminates against *anyone* by denying equal access to the political process." (his italics) It is worthy of note that White joined the majority, which also always included O'Connor, in four recent "colorblind" cases that formed the precedential foundation for *Shaw* -- *Wygant*, *Batson* v. *Kentucky*, 106 S.Ct. 1712 (1986), *Croson*, and *Holland* v. *Illinois*, 110 S.Ct. 803 (1990), all of which except *Batson* were 5-4 decisions. Justice White certainly did not believe that *Shaw* necessarily followed as a logical implication of the others. *Batson*, at 1718, n.19, used the phrase "discrimination against."

[49]Id., at 2824. Italics added. Although voting is an individual right, it is exercised in a way that is fundamentally different from the social processes that underly judicial decisions in school segregation or employment discrimination. From the time of Charles Sumner's brief in *Roberts* v. *Boston*, 5 Cush. 198 (1849) to the present, critics of school segregation have decried treating individuals differently because of a fact that was irrelevant to their educational ability or learning styles, their race. Thus, to deny an individual admission to a particular school on the basis of ability might be reasonable, but to assume that her ability was lower just because she was African-American was arbitrary, a deprivation of due process or, as in many early state constitutions, of the "law of the land." Exactly the same propositions underly employment discrimination law. On the *Roberts* case and the arguments that swirled around it, see Kousser, *supra*, n. 41.

On the contrary, voting and redistricting are inherently group-oriented processes, because success depends not only on your own vote, but on the votes of people like you, not only on what district you are in, but who else is in your district. In an electorate where opinions and behavior are sharply divided on the basis of race, to fail to take race

between racial and district lines in minority opportunity districts and if the boundaries of such districts were, in the mind of some judge, "bizarre."[50]

It might be difficult to determine "from the face of a single member districting plan that it *purposefully* distinguishes between voters on the basis of race,"[51] O'Connor admitted, but an irregular shape was a tangible and immediate indication of such a purpose.[52] To be sure, not every such distinction or irregularity raised constitutional suspicions. Despite pleas from the RNC, the only sitting Justice to have been a member of a state legislature during a redistricting (she was appointed to the Arizona Senate in 1969)[53] refused to overturn strong precedents and read compactness into the Constitution.[54] Nor did she grant Everett's prayer for race-unconscious districting, for "This Court

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into account in districting is to deny any particular member of a minority group the opportunity to have her views represented. In other words, to deny group representation is to deny individual representation.

[50] To the extent that O'Connor's opinion stresses compactness, it is much less clearly grounded in constitutional language than, for example, Justice Brennan's stress on population equality in *Kirkpatrick* v. *Preisler*, 89 S.Ct. 1225 (1971). In this respect, Brennan and his allies were constitutional conservatives, constraining judicial latitude, while O'Connor and the other members of the *Shaw* majority were loose constructionists, tending toward untethered judicial supremacy.

[51] Id, at 2826. Italics supplied.

[52] In her discussion of *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960), Justice O'Connor seems to distinguish between "purpose," which she treats as a Fourteenth Amendment concern, and "motivation," which she appears to associate with the Fifteenth Amendment only, and she appears to mean "effect" when she says "purpose." *Shaw*, at 2826. ("*Gomillion* thus supports appellants' contention that district lines obviously drawn for the purpose of separating voters by race require careful scrutiny under the Equal Protection Clause regardless of the motivations underlying their adoption.")

This usage, if followed consistently, would throw equal protection law into utter chaos. In voting rights law, for example, *Bolden*'s intent requirement and *White* v. *Regester*'s "totality of the circumstances" effect test would become indistinguishable, and presumably the incidental effect standard of *Whitcomb* v. *Chavis* would have to be abandoned entirely. *Washington* v. *Davis* and all its progeny, several of which were cited favorably by O'Connor in *Shaw*, at 2824-26, would be difficult to justify, because they stand for the principle that a statute that impacts people of different races or genders differently -- i.e., has a racially discriminatory effect -- is only unconstitutional under the Fourteenth Amendment if its purpose or motivation or intent (the Court does not consistently differentiate between these terms) is racial or sexist. Since O'Connor cannot have meant to throw out so much settled law so casually, I conclude that her distinction between purpose and motivation in *Shaw* has no significance.

[53] Peter William Huber, "Sandra Day O'Connor," in Claire Cushman, Ed., *The Supreme Court Justices: Illustrated Biographies, 1789-1993* (Washington: Congressional Quarterly, 1993), 506-10.

[54] Id, at 2827. For precedents, see, e.g., *Gaffney* v. *Cummings*, 412 U.S. 735, at 752, n. 18 (1973); *Kirkpatrick* v. *Preisler*, 89 S.Ct. 1225 (1969), at 1231. In *Shaw* v. *Hunt*, plaintiffs contended without any evidence in actual experience that compactness was implicit in the notion of single member districts because "There would have been

never has held that race-conscious state decisionmaking is impermissible in *all* circumstances."[55] But O'Connor did agree with Justice Stevens's view in the 1983 *Karcher* case that "dramatically irregular shapes may have sufficient probative force to call for an explanation."[56] All the presence of "bizarre," heavily minority districts in a plan did was to create a rebuttable, *prima facie* case of "racial gerrymandering." The explanation to be offered was of racial *intent*, not effect, and effect was irrelevant because O'Connor was concerned with discrimination *between*, not *against*, concerned with what she viewed as a general societal evil, not with with deprivation of the rights of a person or group.[57]

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no logic in requiring single-member districts if there were no principle of compactness to help assure that representatives in Congress would have a reasonable opportunity to know their constituents and that voters would have a reasonable opportunity to know incumbents and learn about challengers." If such considerations did not compel politicians in the 19th century, when transportation and communication were much more difficult and when the population of each district was considerably smaller, it would be bizarre to make them controlling, for the first time in American history, in the 1990s.

[55]Id, at 2824.

[56]Id, at 2827, quoting *Karcher* v. *Daggett*, 462 U.S. 725, at 755 (1983) (Stevens, J., concurring).

[57]I am of course not the first to notice this distinction in O'Connor's opinion. See Note, "The Supreme Court -- Leading Cases," 107 Harvard LR 144 (1993), at 200-04; Thomas C. Goldstein, "Unpacking and Applying *Shaw* v. *Reno*, 43 *A.U.L.R.* 1136 (1994), at 1154. The importance of the distinction is most easily illustrated in the classic cases of *Plessy* v. *Ferguson*, 163 U.A. 537 (1896), and *Brown* v. *Board of Education*, 347 U.S. 483 (1954). The argument in *Plessy* between Justice Henry Billings Brown, who wrote the majority opinion, and Justice John Marshall Harlan, who dissented, was in effect over whether the Louisiana legislature had meant to make a discrimination *between* railroad passengers on the basis of race also a discrimination *against* people whom a conductor did not consider white. Segregation, Justice Brown disingenuously concluded, stamped "the colored race with a badge of inferiority . . . solely because the colored race chooses to put that construction on it." The Kentuckian Harlan would have nothing of this charade: "Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons." In other words, recognizing that in this instance, a discrimination *between* amounted to a purposeful discrimination *against*, Harlan found a violation of equal protection. See the discussion in Charles A. Lofgren, *The Plessy Case: A Legal-Historical Interpretation* (New York: Oxford Univ. Press, 1987), at 172, 192.

In *Brown* v. *Board*, the associated cases decided with it, and a myriad of previous "separate but unequal" cases at the state, district, and Supreme Court levels, the NAACP-LDF spent an incalculable amount of time trying to show that either the inputs or the outputs of segregated education discriminated against blacks. That is, either the facilities or expenditures were unfairly distributed or African-American children were psychologically damaged by being treated as inferiors or both. That is, of course, the reason for the famous footnote 11, based on extensive evidence presented by social psychologists at trials, which showed that the Court had what was thought to be sound empirical evidence for the view that for blacks, segregation was "inherently unequal." If courts had believed that a simple enunciation of a "colorblind principle" were all that was necessary to win a segregation suit, it certainly would have saved a great many plaintiffs a great deal of trouble. See Richard Kluger, *Simple Justice* (New York: Alfred A. Knopf, 1976), at 315-45. To suggest now that those and other cases stand for no more than that slogan is to falsify the history of that struggle.

2. Three Stages in Drawing a Minority Opportunity District

The Supreme Court's implicit understanding of a set of legislative decisions that result in an irregularly shaped, heavily minority district actually models the decisions in North Carolina and Texas fairly accurately. O'Connor's opinion recognized a sequence of three decisions: to take race into account, to draw a minority opportunity district at all, and to draw it in the place that it was drawn with the shape that it finally had. The first decision, O'Connor agreed, was inevitable and therefore surely constitutional: "[R]edistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors."[58] Since they will always have the information and since the knowledge may be crucial to their political careers and policy goals, it would be naive to assume that redistricters will avoid using it, and pointless to spend time and effort proving that they do so.

Second is the decision to establish such a district. Four pieces of evidence suggest that the majority recognized this as a distinct stage, and that they found no constitutional infirmity here. For one thing, the Court had directed the attention of attorneys to the following question when it granted *cert.*: "Whether a state legislature's intent to comply with the Voting Rights Act and the Attorney General's interpretation thereof precludes a finding that the legislature's congressional redistricting plan was adopted with invidious discriminatory intent where the legislature did not accede to the plan suggested by the Attorney General but instead developed its own."[59] As complicated as the question was, it certainly focused not on the adoption of such a district *per se*, but on the establishment of a district *different than* the Department of Justice had mentioned in its Section 5 objection letter. That district, O'Connor casually termed "reasonably compact," without having been presented with any detailed evidence about the district or giving any definition whatsoever of compactness.[60] For another thing, O'Connor approvingly discussed the division of Manhattan in the 1960s into one overwhelmingly minority and three white congressional districts, which had withstood legal

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[58]Id., at 2826. O'Connor did not explain *how* the legislature became aware. But, as we shall see below, politicians and technicians did not need all the very latest census figures in order to know, in a general sense, what types of people lived where.

[59]Department of Justice appeal brief in *Shaw* v. *Barr*, p. I. The Court ignored that question entirely in its opinions.

[60]Id, at 2832. In fact, although O'Connor had no reason to know it, the Republican-drawn district that the Justice Department referred to was thirty miles longer and was much more difficult to traverse than the Twelfth District that the legislature finally adopted. It also did not contain a majority of African-Americans.

accusations of racial gerrymandering.[61] For a third thing, she stated explicitly that "we express no view as to whether 'the intentional creation of majority-minority districts, without more' always gives rise to an equal protection claim."[62] For a fourth, the Supreme Court and numerous lower courts have approved drawing minority opportunity districts, as the Supreme Court did unanimously in the *Quilter* case during the same term.[63]

A comparison between the packing of blacks into Ohio state House districts by the Republican-majority State Apportionment Board that was at issue in *Quilter* and the situation in *Shaw* underlines the point. In both cases, apportioners admitted their color-conscious intention to draw majority black districts; in both, they claimed to have been acting in order to satisfy commands of the Voting Rights Act; in both, it was so widely understood that partisan, as well as racial motives played a role in the drawing of the majority-minority districts that judges took explicit notice of the fact; in both, the effect of their actions was to draw districts that black candidates could carry and, in fact, most of the Ohio districts were more heavily black -- more nearly "segregated" in the *Shaw* opinion's term -- than the racially quite balanced North Carolina districts. What separated the two cases most fundamentally was that because the Ohio redistricters had more districts to work with -- 43 state House districts in the 6 counties where blacks were mostly concentrated, as opposed to 12 congressional districts in North Carolina[64] -- and because the ghettoes in in Charlotte and Raleigh were not as large as those in Cleveland, Columbus, and Cincinnati, the North Carolina districts could not be so geographically compact as those in Ohio. Thus, *Shaw* should not be taken to rule that minority opportunity districts can never be created, that the equal protection clause somehow dictated that every district be majority Anglo, no matter what.[65]

The Court's focus on irregular[66] shapes, as well as its apparent approval of the two earlier stages of legislative decisionmaking, indicate that the key choice that the majority in *Shaw* v. *Reno* thought

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[61]Id., at 2826, citing *Wright* v. *Rockefeller*, 376 U.S. 52 (1964). Adam Clayton Powell's district was 86.3% black and Puerto Rican, and plaintiffs had challenged its lines as "jagged" and "irrational" ones that "ghettoized" non-whites. The Supreme Court rejected the challenge, 7-2, as had the district court.

[62]Id., at 2828, quoting White's dissent in id., at 2839.

[63]*Voinovich* v. *Quilter*, *supra*, n. XX.

[64]U.S. Dept. of Justice Brief to Supreme Court in *Voinovich* v. *Quilter*, at 3.

[65]Nonetheless, plaintiffs in the Mississippi case of *Thornton* v. *Molpus* (No. 2:74 CIV 357 PS, S.D. Miss., filed Oct. 11, 1994), at par V., come close to making this contention.

[66]By my count, O'Connor uses or quotes the word "irregular" four times, "bizarre" three, and "egregious" once.

needs explanation is the third stage, the reasons for the final outline of the district.[67] If that is what has to be explained, and if the *real* reasons,[68] not just the public relations justifications for the shape count, then, as the detailed analyses of North Carolina and Texas redistricting below will show, race may have been only a fairly minor contributing factor at that stage of the process.[69]

3. Why "Racial Gerrymandering" Harms Society: Shaw's Contradictions

O'Connor justified the radical break with precedent in *Shaw* v. *Reno* by three assertions about what are, in essence, empirical questions that can be answered by social science, but on which she was neither provided with any evidence by any parties to the litigation nor sought systematic evidence herself.[70] Non-compact minority opportunity districts, she said, in a public policy argument that

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[67]Across the country, the 1991 reapportionment processes were probably the most open in our history and the rules for drawing districts were the most explicit and fair (avoid population deviations and avoid splitting areas containing concentrations of minority groups) that they have ever been. If in the future, fears that openly race-conscious redistricting will legally endanger a plan inhibit people from using and publicizing racial statistics and from openly considering the racial consequences of different apportionment schemes, the consequent subterfuges will no doubt only hamstring defenders of minority rights and undermine the unfinished effort to bring full equality of opportunity to the political sphere. Is a charade that employs proxies of race, such as Democratic registration and poverty, to set up black and Latino districts or to pack minorities into districts really preferable to honest public discussions not conducted in coded language?

[68]Pildes and Niemi, *supra*, n. XX, argue that instead, *Shaw* should be read as constitutionalizing a "district appearance claim," that it will ultimately be seen as merely a constraint on objectively non-compact minority opportunity districts, and that courts may disregard the real reasons that a district attained the shape it had. Id., at 204-05. Although this may be the best strategy for confining *Shaw*, it is one that, as they realize (p.187), potentially threatens many minority seats, and it is difficult to reconcile with vote dilution and affirmative action law, making *Shaw* much more revolutionary and original than it purports to be.

[69]The majority opinion in *Shaw* v. *Hunt* (*supra*, n. XX, at n. 54) seems to suggest that O'Connor believed that any district in which racial and district lines were highly correlated was suspect, whatever the actual purposes of the legislature in drawing those lines were. The Louisiana court in *Hays* v. *Louisiana*, 839 F.Supp. 1188 (W.D. La. 1993), at 1195, does so more clearly, though it confuses what I have called the second and third stages. Id., at 1202. Thus, a *prima facie* case would allow plaintiffs to jump immediately to strict scrutiny. This interpretation of O'Connor's opinion ignores both its language and its logic.

[70]It is noteworthy that for all of the emphasis on compactness in *Shaw* and its successors, O'Connor nowhere discussed the chief alleged benefit of compactness, to which empirical evidence would also have been pertinent -- that compact districts facilitate communication between a representative and her constituents. One might compare, e.g., the volume of constituent requests to members of Congress in districts with different compactness levels, allowing for differences due to the representative's seniority. If proponents of compactness are correct, there ought to be many fewer requests directed to the representative of a "funny-shaped" district than to one of a more regular district. Other social scientists could no doubt think of other relevant evidence. For the claim that such communication is a benefit of compactness, see Everett, *supra*, n. X, at 44-45, n.11.

might well have been addressed to a legislature, reinforce the stereotype "that members of the same racial group -- regardless of their age, education, economic status, or the community in which they live -- think alike, share the same political interests, and will prefer the same candidates at the polls." Such districts "may exacerbate . . . patterns of racial bloc voting . . . " Finally, they make elected officials "more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." Putting all three together in a quotable conclusion, O'Connor suggests that "Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions . . ."[71]

This is the heart of O'Connor's opinion.[72] If the assertions are wrong or unsupported by evidence or unreflective, or if other potentially beneficial real-world consequences balance them, then there is no rationale for the majority's new cause of action, no compelling judicial reason to toss aside the conservative tradition of judicial self-restraint. But what social scientific research there is on the first two issues, which will be cited in Sections III and IV, below, lends O'Connor very little support. The vast majority of African-Americans are driven toward unity because they are still discriminated against, and racial bloc voting is already a stark reality.[73] Indeed, creating minority opportunity districts may *reduce* racially polarized voting, if they replace districts where blacks or Latinos are present in proportions slightly below those that allow them to elect candidates of their choice. This

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[71]Id., 2827, 2832. O'Connor's peroration continues with two other essentially factual assertions that I believe are incorrect, although it would take much too long to demonstrate that here: ". . . it threatens to carry us further from the goal of a political system in which race no longer matters -- a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." I believe that the framers of the Reconstruction Amendments strove primarily to protect minorities against discrimination, a discrimination that they had fought against too long to expect to evaporate. And I think the nation continues to be deeply split on whether colorblindness is a desirable public policy. The practical effect of O'Connor's assumption of a consensus on such still far-off goals is to impede their attainment, as the post-*Shaw* "racial gerrymandering" cases, which threaten to eliminate at least half of the minority members of Congress, so clearly show.

[72]The NAACP-LDF asserted (Adam Stein, "Gingles Defendant-Intervenors' Pretrial Brief," in *Shaw* v. *Hunt*, at pp. 3-5; Penda Hair, "Post-Trial Brief of Lawson Defendant-Intervenors," in *Vera* v. *Richards*, at p.6) that plaintiffs had to prove the last two assertions true in particular instances in order to have standing to sue. There is no evidence for this gloss in O'Connor's opinion, and it surely contradicts the notion of a "new cause of action" that did not require proof of discrimination *against* anyone, which was the focus of the dissents of White and Souter.

[73]It seems especially odd that Chief Justice Rehnquist would join in this assertion of O'Connor's, in view of his statement in *Batson*, at 1744-45, that "The use of group affiliations, such as age, race, or occupation, as a 'proxy' for potential juror partiality, based on the assumption or belief that members of one group are more likely to favor defendants who belong to the same group, has long been accepted as a legitimate basis for the State's exercise of peremptory challenges."

was, indeed, the case in both North Carolina and Texas.[74] As to the third assertion, it is doubtless true that all representatives of any race pay special attention to the constituents who support them or whose votes they might be able to win in the future. White members of Congress from North Carolina before 1993, objective measures will show, were largely unresponsive to the policy preferences of their African-American constituents. For instance, despite the fact that it was over 20% black, the Charlotte congressional district before 1992 sent to Washington uniformly conservative Republican congressmen, who completely ignored the policy views of their African-American constituents. O'Connor's implicit assertion that *white* representatives pay attention to their "constituency as a whole" is simply not true, especially if some of their constituents are black.

It is also worth noting that the three assertions contradict each other. If there already is racial bloc voting, then treating members of each racial group as having systematically different preferences is facing reality, not creating stereotypes.[75] The proposition that an African-American or Latino member of Congress may feel herself responsive only to members of her group, and not to whites, presumes that her group has distinctive preferences, again contradicting the stereotype argument. Finally, if the stereotypes are not true, then racial bloc voting will not occur, no member of Congress will think herself particularly beholden to any group, and no constituent will be left out.

Whatever their factual or logical status, these alleged consequences of racial gerrymandering make clear that the majority opinion in *Shaw* v. *Reno* should not be extended, as the Texas court imagined, to ban the conscious placing of blacks or Latinos into majority-Anglo districts to buttress or create Democratic majorities.[76] First, such an extension would contradict the stereotype argument because the minority group members would be assumed to have the same preferences as large numbers of Anglos in the majority-Anglo district, joining them to vote for a presumably Anglo Democrat. Second, racial bloc voting could not increase in such a case, because it is assumed that minorities would join many whites in supporting a candidate for Congress. Third, although the winning Democrat might be responsive only or mostly to Democrats, by assumption, those Democrats would come in all colors, contradicting the third assertion. Placing overwhelmingly Democratic African-Americans or predominantly Democratic Latinos in Anglo Republican districts might dilute the minorities' votes, but would not increase segregation or, on the evidence from North Carolina and

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[74]Although there were racially polarized Democratic primaries in the North Carolina 1st District and the Texas 29th in 1992, the primary elections in the North Carolina 12th, and the Texas 28th and 30th were not polarized. In all five of the general election contests in new minority opportunity districts, the Democratic candidates won so overwhelmingly (by from 65% to 87% of the vote) that there could not have been much racial polarization. The contrast between these elections and those in the old North Carolina 2nd in 1982 and 1984 (see below, Section III.B.6-7) is very striking.

[75]*Shaw* v. *Reno*, at 2845, n.2 (Souter, J., dissenting).

[76]*Vera* v. *Richards*, *supra*, n. X.

Texas, change the way the Republican voted. It would therefore not be illegal under *Shaw*. What O'Connor believes are the bad consequences of racial gerrymandering, then, serve also to confine the application of the decision to minority opportunity districts alone.

4. Unsettled and Unsettling Issues: Shaw's Ambiguities

It is useful to divide the many ambiguities in O'Connor's opinion -- ambiguities that bedeviled the lower courts and helped to lead them into error -- into two major parts, depending on which side of the "strict scrutiny" line they fall. That is, are they part of the argument on whether the legislature has made a forbidden classification, or do they apply to the phase of the case in which a court has decided that the classification is tainted, and it requires the legislature to come up with extremely good reasons ("compelling interests") for it and to have used means of putting the classification into effect that have the fewest bad consequences ("narrow tailoring")?[77]

a. Before Strict Scrutiny

There are five crucial issues in determining whether a boundary constitutes a "racial gerrymander" on which O'Connor's opinion is deeply ambiguous. First, did she really mean to exclude any consideration of effect, as dissenters White and Souter charged?[78] If so, how would the case fit into any line of previous civil rights or affirmative action cases and who could claim the right to vindicate the public interest in avoiding racial classifications? Can anyone living anywhere in a state -- or anywhere in the country, for that matter -- claim standing to represent the public interest against what he claims is a racial gerrymander? If liberal judges had suddenly announced a new,

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[77]*Wygant* v. *Jackson Bd. of Educ.*, 106 S.Ct. 1842 (1986), at 1847. It is extremely ironic that the strict scrutiny/compelling state interest/narrow tailoring triad should be said to derive from the Japanese exclusion cases, not only because the Court in those cases allowed that massive deprivation of rights to proceed, but also because the U.S. government almost certainly could have proven, on the basis of information that it made public then, that it had a compelling interest and that its actions were narrowly tailored. The interest was preventing a potential Japanese invasion from being assisted by what the government would have claimed to be suspicious persons, and the action was tempered by being aimed only at Japanese-Americans on the West Coast, where such an invasion would have been most likely. That is, the test by itself would not even have outlawed the paradigm case it is aimed at, unless the Court had been willing to contest the government's presentation of facts. Thus, the classic formulation of equal protection law rests not on a formal theoretical structure, but on the judiciary's willingness to get to the underlying facts, which accords with the overall argument of this paper.

[78]*Shaw* v. *Reno* at 2834, 2836, 2841 (White, dissenting), 2847 (Souter, dissenting).

far-reaching right, the "right to participate in a 'color-blind' electoral process,"[79] that emerged from no particular section or even penumbra of the Constitution, if that right by its very existence contradicted the standards implicitly or explicitly employed in hundreds or thousands of cases, if the newly-minted right invited the assertion by analogy of other vast and vague rights, then the cries of outrage and derision from conservative critics would have been deafening. One imagines Robert Bork's stern denunciations of this breakdown of judicial self-restraint, George Will's shorter, but more polysyllabic version of Bork's line, and endless snide *Wall Street Journal* editorials. When a "conservative" court acts in this way, however, the erstwhile critics of judicial overreaching are strangely silent, and the news media almost uniformly fail to emphasize the potential doctrinal significance of the case.

Second, how high did the correlation between racial percentages and district lines have to be to constitute a prima facie case of racially discriminatory intent? Playing the language game by Humpty Dumpty's rules,[80] O'Connor repeatedly described the issue as one of "segregat[ing] voters." But what level of "segregation" is suspect? The First and Twelfth districts in North Carolina and the Thirtieth in Texas are the most racially balanced in each state -- i.e., the closest to 50% of the predominant ethnic group. Why does this amount to "segregation"?[81] Third, how is compactness to

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[79]*Shaw* v. *Reno*, at 2824.

[80]"'When *I* use a word', Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean -- neither more nor less.'

"'The question is', said Alice, 'whether you *can* make words mean so many different things.'

"'The question is', said Humpty Dumpty, 'which is to be master -- that's all.'"

Lewis Carroll, *Through the Looking Glass*, in *The Complete Works of Lewis Carroll* (London, The Nonesuch Press, 1939), at 196.

[81]The asserted connection and analogy between *Gomillion* v. *Lightfoot* and *Shaw* are very inexact. In 1960 Macon county, Alabama had the highest proportion of black population, 84%, of any county in the country, and to avoid the consequences of rising black voter registration, a state senator redrew the previously square boundaries of the city of Tuskegee in a way that excluded all but about a dozen African-Americans. This was, indeed, segregation, and blacks were excluded or "fenced out" of the most important decisions in the county. And the evidence for the racial discrimination was not merely the "uncouth, 28-sided figure" of the resulting boundaries, but also the percentages of people of each race in the county who were inside and outside of the Tuskegee city limits before and after the change. (In fact, plaintiffs could easily have offered much more extensive qualitative evidence of discriminatory intent.) In stark contrast, those in or out of the 1st and 12th congressional districts in North Carolina and the 18th, 29th, and 30th in Texas could still vote in equally important congressional elections and were not placed in districts that were nearly so overwhelmingly composed of members of one race as in Alabama in the late 1950s. For these and other pertinent facts about the Tuskegee gerrymander, see Robert J. Norrell, *Reaping the Whirlwind: The Civil Rights Movement in Tuskegee* (New York: Alfred A. Knopf, 1985).

be measured and what level of which of the twenty-odd indices proposed is constitutionally suspect?[82] If no objective measure[83] is to be employed, how are courts to avoid inconsistent, unprincipled, or even biased or partisan decisions?[84] And how are they to avoid the appearance and the reality of instituting a racial double standard if they apply strict compactness standards to minority opportunity districts, but not to majority-white districts? Moreover, does O'Connor seriously believe that compactness is a "traditional districting principle,"[85] or should courts that are trying to determine whether a particular districting arrangement requires extraordinary justification first determine what past practices in the state have been and then compare the process and outcomes in the instance at issue? Suppose that irregular boundaries and racial discrimination against minorities typified past practices and that the difference this time was that minorities won. Would this constitute a constitutional violation, if some judge did not like the shape of a resulting district?

Fourth, how much does race have to count in the decisions about boundaries? O'Connor states *fifteen times* that it must be the single reason:

> What appellants object to is redistricting legislation that is so extremely irregular on its face that it rationally can be viewed *only* as an effort to segregate the races for

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[82]For a list of indices, see Richard G. Niemi, Bernard Grofman, Carl Carlucci, and Thomas Hofeller, "Measuring Compactness and the Role of a Compactness Standard in a Test for Partisan and Racial Gerrymandering," 52 *Journal of Politics* 1155, at 1161-62 (1990).

[83]O'Connor referred, at 2827, to compactness, contiguity, and respect for political subdivisions as "objective factors," but contiguity is trivial, political subdivisions must be cut to satisfy the Court's population equality decisions, and no post-*Shaw* court has applied any objective or precise measure of compactness in its decision. Every judge, including O'Connor in *Shaw* v. *Reno*, has assumed that she knew noncompactness when she saw it. Why should such measures be considered better or more objective indications of the intent of a legislature than statements by legislators or extensive analyses of the facts by observers?

[84]After the first decision in *Hays* v. *Louisiana*, the State legislature constructed a new majority opportunity district consciously patterned after a district drawn in the 1970s. *Voting Rights Review* (Summer 1994), map, at 25. Nonetheless, the three-judge panel, in a ruling from the bench, threw it out without hearing any evidence from plaintiffs about its compactness and substituted its own plan, which contained no minority opportunity district and a new open seat that former Klan leader and current Republican David Duke described as "tailor-made" for him. "After Modigliani," *The Economist* (Aug. 27, 1994), at 21; Elaine R. Jones, ". . . Black Lawmakers," *New York Times*, Sept. 11, 1994, at E19, c. 2.

[85]In *Karcher* v. *Daggett*, 103 S.Ct. 2653 (1983), at 2663, a majority opinion in which O'Connor joined considered that several reasons (not compelling state interests) might justify population variances between districts: ". . . making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives." In *Karcher*, compactness was merely one of a number of legitimate redistricting principles, which included incumbency protection.

purposes of voting . . . [2824][86] Classifications of citizens *solely* on the basis of race . . . [2824] 'unexplainable on grounds other than race' . . . [2825][87] could not be explained on grounds other than race . . . [2825] '*solely* concerned with segregating white and colored voters . . .'[88] [2825] obviously drawn for *the* purpose of separating voters by race . . . [2826] could 'be explained *only* in racial terms. . . .'[89] [2826] not so bizarre as to permit of *no other* conclusion. . . . [2826] *anything other* than an effort to 'segregat[e] . . . voters' on the basis of race. . . .'[90][2826] When a district obviously is created *solely* to effectuate the perceived common interests of one racial group . . . [2827] rationally cannot be understood as *anything other* than an effort to separate voters into different districts on the basis of race . . . [2828] cannot be understood as *anything other* than an effort to classify and separate voters by race . . . [2828] rationally could be understood *only* as an effort to segregate voters by race. . . . [2829] rationally cannot be understood as *anything other* than an effort to segregate citizens into separate voting districts on the basis of race . . . [2830] a reapportionment scheme so irrational on its face that it can be understood *only* as an effort to segregate voters into separate voting districts because of their race . . . [2832]

Did the Justice really mean that unless, upon further investigation, race remained the *only* reason for drawing lines the way they were, there was no constitutional violation?[91] If partisanship or incumbent protection or the myriad compromises necessary to meet the often eccentric demands of

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[86]All passages are quoted from Justice O'Connor's opinion in *Shaw* v. *Reno*, with page numbers in brackets after the passage quoted. Italics supplied.

[87]This passage from *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, at 266 (1977) is quoted twice on the same page of *Shaw*.

[88]Quoted from *Gomillion* v. *Lightfoot*, 364 U.S. 339, at 341 (1960).

[89]Quoted from *Wright* v. *Rockefeller*, 376 U.S. 52, at 59 (1964).

[90]Quoted from *Gomillion*, at 341.

[91]Compare her majority opinion in *Croson*, at 721-22, condemning "a rigid rule erecting race as the *sole* criterion in an aspect of public decisionmaking." Italics supplied. In Richmond, race *was* the sole threshold qualification for gaining 30% of city contracts. *Marylanders for Fair Representation, Inc.* v. *Schaefer*, 849 F.Supp. 1022 (D.Md. 1994), at 1054 interpreted *Shaw* to mean that race had to be the legislature's *sole* consideration for a challenge to a reapportionment to succeed. Richard H. Pildes and Richard G. Niemi, "Expressive Harms, 'Bizarre Districts,' and Voting Rights: Evaluating Election-District Appearances After *Shaw*," 92 *Mich. L.R.* 101 (1993), at 119: "Under *Shaw*, race is not an impermissible factor that corrupts the districting process -- as long as it is one among many factors that policymakers use." *Shaw* comes into play, Pildes and Niemi assert, only when "race becomes the single dominant value."

politicians explain many of the twists and turns on a map, and if but for such drives, the districts would have been much more compact, is there still an equal protection violation?[92] Or did O'Connor, as the Louisiana court imagined, mean the opposite of what she said -- that if race played *any* role at all in shaping a district, the lines were illegal?[93] Or perhaps race had to be the *predominant* reason for a boundary.[94] How would one weigh various reasons? Should the weights be similar in "racial gerrymandering" and intent-based vote dilution cases? Surely, O'Connor did not think that the mere shape of a district or its racial composition is the only sort of evidence relevant to determining whether a plan is a "racial gerrymander," for she invited a test, a further attempt at accounting for the lines: "[I]f appellants' allegations of a racial gerrymander are not contradicted on remand, the District Court must determine whether the General Assembly's reapportionment plan satisfies strict scrutiny. . . [2830] If the allegation of racial gerrymandering remains uncontradicted, the District Court further must determine whether the North Carolina plan is narrowly tailored to serve a compelling governmental interest." [2832][95]

Fifth, what would count as alternative explanations of district shape that would block the road to strict scrutiny by undermining the view that the redistricting amounted to a racial classification? O'Connor mentions only "traditional districting principles such as compactness, contiguity, and respect for political subdivisions."[96] But since contiguity is trivially attained, at least in a mathematical

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[92]The task of weighing competing values is surely one that is more fit for a legislature than for a court. Legislators are *supposed* to represent different values and interests, are *supposed* to compromise and have to live with their deals, and are subject, if they perform badly, to rejection at the polls. Judges' roles are much more circumscribed -- too circumscribed to hand over the whole business of reapportionment to them, as some possible extensions of *Shaw*, such as that proposed by Daniel D. Polsby and Robert D. Popper, "Ugly: An Inquiry into the Problem of Racial Gerrymandering Under the Voting Rights Act," 92 *Mich. L.R.* 652 (1993), at 679, would make certain.

[93]*Hays* v. *La.*, *supra*, n. XX, at 1202 stated that the standard for defendants to prevail under *Shaw* is that the challenged redistricting plan must be able to "be explained *entirely* without reference to racial gerrymandering." Italics supplied. But *Hays* also inconsistently held, at 1202, n. 46, that "*Shaw* requires only that race be an important factor."

[94]*Johnson* v. *Miller*, cite, Mss. at 4.

[95]In *Shaw* v. *Hunt*, 861 F.Supp. 408 (1994), at 427-34, Judges Phillips and Britt treated these apparent invitations to gather more evidence of the legislature's purposes before assessing compelling interests as meaningless, although plaintiffs pressed the issue forcefully and presented plentiful evidence of other purposes. By excluding this evidence from their opinion, Phillips and Britt made it difficult for the Supreme Court to determine whether it existed or not, and in effect conceded the issue, rather than taking the Supreme Court at its word.

[96]*Shaw* v. *Reno*, at 2826-27.

sense,[97] and since it was the lack of apparent compactness and observance of municipal boundaries that made out a *prima facie* case of racial gerrymandering in the first place, why remand the case and allow the state to rebut the racial classification thesis at all if these are the only acceptable reasons for drawing lines? Clearly, the implication of O'Connor's opinion is that the civics textbook principles are not the only valid ones, even before one gets to strict scrutiny.[98]

b. After Strict Scrutiny

If no other explanation suffices and particular boundaries are ruled to be enough of a racial gerrymander to meet a court's standards, what constitutes a compelling state interest and what is narrow tailoring in the redistricting context?

O'Connor distinguished three possible compelling state interests, although she did not explicitly foreclose others. First, a state could be attempting to comply with Section 5 of the Voting Rights Act, the section that requires changes in electoral rules in the Deep South and certain other areas of the country to be precleared by the Justice Department.[99] She cautioned, however, that according to *Beer* v. *U.S.*[100], compliance cannot justify going farther than preserving the racial status quo. "A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression."[101] In this instance, since North Carolina in 1990 contained no minority opportunity districts, it would appear that, under O'Connor's analysis, Section 5 would not require it to draw any at all, even if such a district were maximally compact. Her interpretation would, therefore, freeze white supremacy and black exclusion in place and force the Justice Department to preclear electoral changes even if they would patently violate Section 2 of the Voting Rights Act or the Fourteenth or Fifteenth Amendments -- surely not what the

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[97]Katerina Sherstruk, "How to Gerrymander: A Formal Analysis," (Caltech Social Science Working Paper 855, July, 1993).

[98]Justice White implied (*Shaw* v. *Reno*, 2841, n. 10, and accompanying text) that incumbent protection and partisanship are two reasons that would obviate the necessity of imposing strict scrutiny. It is instructive that White, who began the Court's recent plunge into intent analysis with *Washington* v. *Davis*, should dissent so strongly from O'Connor's *Shaw* opinion, which was decided on the basis of intent.

[99]This was emphasized as a compelling state interest in *Shaw* v. *Hunt*, *supra*, n. X, at 474.

[100]425 U.S. 130 (1976).

[101]*Shaw* v. *Reno*, at 2831.

framers in 1965 or the amenders in 1982 had in mind.[102] Second, a state could be attempting to comply with Section 2, which, according to *Gingles*, requires that plaintiffs meet three conditions: that the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district," that there is racially polarized voting, and that minority-preferred candidates generally lose.[103] Whether these conditions held in the particular case, O'Connor announced, were empirical questions that could be answered on remand.[104] Third, under *Croson* and other cases, states have "a significant state interest in eradicating the effects of past racial discrimination."[105] The only past racial discrimination that O'Connor seemed to have in mind here was racial bloc voting, and she specifically reserved the question of whether drawing a minority opportunity district would be the most precisely tailored way of remedying such discrimination.[106] What she did not consider at all is that this interest might arise because of a state's desire to avoid a lawsuit under the Reconstruction Amendments because of past discrimination in redistricting itself.[107] If pre-1991 state action on redistricting that clearly violated the Constitution's equal protection clause and the Fifteenth Amendment could be demonstrated, as I believe it can be in both North Carolina and Texas, then such

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[102]Department of Justice regulations 28 C.F.R. Sec. 51.52 and Sec. 51.55 (a)(2) prohibit preclearance under these circumstances. For the reasoning behind them, see Drew S. Days III, "Section 5 Enforcement and the Department of Justice," in Bernard Grofman and Chandler Davidson, Eds., *Controversies in Minority Voting: The Voting Rights Act in Perspective* (Washington: Brookings Institution, 1992), at 57. *Hays* v. *La.*, at 1997, n.21, concluded that unless a plan were retrogressive, it could not have a discriminatory effect -- a holding that would constrain Section 2 and the Fifteenth Amendment to the narrowest interpretation of Section 5.

[103]*Thornburg* v. *Gingles*, 478 U.S. 30, at 50-51. Note that all three of these are factual, not theoretical questions, typifying the fact-intensive nature of voting rights jurisprudence before *Shaw* v. *Reno*.

[104]Although O'Connor did not mention other "Senate factors" (See *Senate Report 417, supra*, n. XXX, at 28-29) that Congress suggested were relevant in a "totality of the circumstances" inquiry under Section 2, the *Shaw* plaintiffs did develop these on remand. The opinions of the three-judge panel, however, largely ignored this argument.

[105]The quotation is from *Shaw* v. *Reno*, at 2831, citing *Croson*, 488 U.S. at 491-93, 518; *Wygant*, 476 U.S., at 280-82, 286.

[106]*Shaw* v. *Reno*, at 2832.

[107]O'Connor's dissent in *Metro Broadcasting, Inc.* v. *F.C.C.*, 110 S.Ct. 2997 (1990), at 3032-33, calling for justification by "narrowly confined remedial notions," rather than reliance on general societal discrimination, suggests that O'Connor generally favors a factual, historical approach to the question of past discrimination -- an approach that defendants provided in the North Carolina, Texas, and Louisiana cases. Similarly, see her majority opinion in *Croson*, at 730. Even Justice Scalia, *id.*, at 738, agreed that states could adopt race-conscious remedies to overcome past discrimination.

an interest should count much more heavily than the private discriminatory actions of white voters. It would be bizarre for the Court to rule that a state could remedy this sort of constitutional violation only if it followed "sound districting principles,"[108] principles that are themselves nowhere mentioned in the Constitution or in federal law and which, the analysis below will show, have never been consistently followed by the states in question.

O'Connor nowhere clarified what "narrow tailoring" means when applied to redistricting, and parties on each side of subsequent cases have offered starkly different definitions.[109] On the one hand, plaintiffs have claimed that narrow tailoring requires the adoption of the most compact districts feasible,[110] or perhaps both the most compact and the most politically and ethnically competitive.[111] Since as argued above,[112] only minority opportunity districts are challengeable under O'Connor's holding in *Shaw*, the plaintiffs' position erects a blatant double standard: Anglo districts can be as gangling and politically safe as convenient; districts in which African-Americans or Latinos have a dominant voice must have extremely tidy shapes and perhaps, their representatives can never be politically comfortable. On the other hand, some defendants suggest that any plan that creates an equal or smaller proportion of minority opportunity districts than the proportion that minorities represent in the population is narrowly tailored.[113] This would bring an effect standard back into *Shaw* and reconcile it, at least partially, with minority vote dilution law, and such an

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[108]*Shaw* v. *Reno*, at 2832.

[109]In his dissent in *Shaw* v. *Reno*, at 2842, Justice White posed a series of questions and dilemmas, some expanded upon here, in order to show that the notion of narrow tailoring is unworkable when applied to redistricting.

[110]Michael A. Hess, brief for Republican National Committee in *Shaw* v. *Reno*, at 10; Judge Vorhees in *Shaw* v. *Hunt* uses non-compactness for three purposes: to trigger strict scrutiny, to deny narrow tailoring, and to rule out a potential Section 2 suit as a compelling state interest -- the last, because an undefined compactness notion is part of the "first prong" of the *Gingles* test.

[111]Paul Hurd, "Post-Trial Brief in *Vera* v. *Richards*," at p.5, n.4; p.9; p. 17, n.11; p.23; and his "Proposed Conclusions of Law," in *Vera* v. *Richards*, at p. 6, pars. 20, 22; p. 10, par. 34.

[112]Section II.C.3.

[113]U.S. Post-Trial Brief in *Vera* v. *Richards*, at p.80; U.S. Post-Trial Brief in *Shaw* v. *Hunt*, at pp. 63-65, n.22; Adam Stein, "Gingles Defendant-Intervenors' Pretrial Brief" in *Shaw* v. *Hunt*, at pp. 49-50; *Shaw* v. *Hunt*, *supra*, n. X, at 475.

interpretation certainly gains support from the Supreme Court's *DeGrandy* decision.[114] Other defendants and even the three-judge panel in Louisiana in *Hays* suggest that districts that are not overly packed with minorities are narrowly tailored.[115] For example, if it were possible to draw equally compact districts where one was 90% black and another was 55%, and 55% black was enough, given the level of normal majority and minority registration, turnout, and cross-over votes, to allow the African-American community a fair opportunity to elect candidates of its choice, then the 55% district, but not the 90% district might be narrowly tailored. Such a definition would be consonant with O'Connor's emphasis on the evils of "segregation," but to the extent that *Shaw* is taken to reflect simply a judicial preference for compactness, even the 55% district might not pass muster.[116] Plaintiffs and defendants differ too, about the significance of more geographically compact alternatives that have similar minority percentages. Plaintiffs view them as evidence that the defendants' districts are not narrowly tailored, because they could have adopted more compact ones, and they ask courts to do so.[117] Defendants consider them proof that they acted not out of a desire to isolate minorities or insure safe districts for them, but for other reasons, such as partisanship.[118] Finally, plaintiffs often consider a plan narrowly tailored if it allows minority voters a fair chance to choose candidates of

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[114]*Johnson* v. *DeGrandy*, *supra*, n. XXX.

[115]Department of Justice, "Post-Trial Brief" in *Shaw* v. *Hunt*, at pp. 3-4; Stein, *supra*, n. XXX, at pp. 49-50; *Hays* v. *La.*, at 1206-07; *Shaw* v. *Hunt*, *supra*, n. XXX at 475. Renea Hicks, "State's Post-Trial Legal Memorandum," *Vera* v. *Richards*, at p.38. If the problem with minority opportunity districts is that they burden whites, then the greater the packing of each race, the smaller the statewide proportion of whites "hurt" by being represented by the choice of the black community or by someone influenced by the black community. Thus, such an interpretation of narrow tailoring, which seems consistent with the usage in affirmative action cases, would lead to *more*, not less segregation. It is also worth noting that packing minorities into a small number of districts would risk a minority vote dilution case because it would deny them a chance for political influence equal to that of whites.

[116]In *Shaw* v. *Reno*, the State claimed simply that minority opportunity districts were narrowly tailored as remedies because no districts containing smaller percentages of African-Americans would give them an equal chance to elect candidates of their choice; i.e., no "race neutral means," as called for in *Croson*, at 729, would work. Jefferson Powell, brief for State of North Carolina, *Shaw* v. *Reno*, at 48. As in Justice Brennan's long recitation of Congress's attempts to promote programming diversity through race-neutral means in *Metro Broadcasting*, at 3017-23, North Carolina could be viewed as having experimented with means less favorable to electing the choices of the black community in a series of elections from 1968 through 1990. See below, Sec. III.B.

[117]Thomas Farr, "Memorandum of Law in Support of Plaintiff-Intervenors' Motion for Preliminary Injunction to Enjoin Further Election Proceedings for the Unites States House of Representatives from North Carolina Under the Existing Congressional Redistricting Plan," *Shaw* v. *Hunt*, at 24-26; Paul Hurd, "Plaintiffs [*sic*] Proposed Conclusions of Law," *Vera* v. *Richards*, at p.6, par.22. *Hays*, at 1208-09, accepted such arguments.

[118]Penda Hair, "Post-Trial Brief of Lawson Defendant-Intervenors," *Vera* v. *Richards*, at p.14.

their choice, while at the same time serving other legitimate state interests traditionally protected in redistricting, such as preserving communities or interest and protecting incumbents.[119] Defendants tend to believe those state interests illegitimate.[120]

Although O'Connor's many ambiguities in *Shaw* have bedeviled lower court judges and invited local authorities who wish to retain or revert to lily-white rule to file suits and resist compromises with voting rights forces, the Court's muddiness also affords it relatively painless escapes from the difficulties that the decision poses.[121] It also increases the importance of factual inquiries into questions that the opinion raises, but does not answer. To twist an old saying, when the law is unclear, we have no alternative but to argue the facts.

III. A SHORT HISTORY OF RACE, REPRESENTATION, AND REDISTRICTING IN NORTH CAROLINA

A. HOW WELL DO WHITES REPRESENT BLACKS IN NORTH CAROLINA?

1. Congressional Roll Call Behavior

Although there may be some symbolic value to choosing a person of a particular gender, ethnic group, or occupation, and although elected officials put much of their time and effort into particularized constituency services,[122] the principal purpose of electing a representative is to insure

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[119]Department of Justice, "Post-Trial Brief" in *Shaw* v. *Hunt*, at pp. 3-4; Stein, *supra*, n. XXX, at pp. 49-50.

[120]Hurd, "Post-Trial Brief" in *Vera* v. *Richards*, at p.5, n.4.

[121]See Section V, below.

[122]Every elected official, but perhaps particularly members of Congress, provide "casework" or "constituency services" for virtually anyone in their districts, and sometimes people outside their areas, whether or not they supported the member in the last election. See, e.g., Bruce Cain, John Ferejohn, and Morris Fiorina, *The Personal Vote: Constituency Service and Electoral Independence* (Cambridge, MA: Harvard Univ. Press, 1987). In this sense, most officials may be responsive to almost anyone, and the shape of the district, or the party, ideology, or race of the representative may not matter systematically to voters. A survey of constituent contacts during 1993, for instance, showed that whites were approximately twice as likely to contact newly elected North Carolina members of Congress Mel Watt and Eva Clayton, who are black, than African-Americans were. Allan J. Lichtman, "Report on Congressional Districts in North Carolina," (for *Shaw* v. *Hunt*), at Table 43, p.66. If constituency service is what Justice O'Connor had in mind when she warned in *Shaw* v. *Reno*, at p. 2827 that elected officials from deliberately created majority-minority districts "are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole," then the evidence from North Carolina seems to refute her speculation.

that one's views are represented. Have white and black members of Congress from North Carolina voted in the same way? Have whites reflected black interests so well that blacks do not need black faces to represent them, as Prof. Carol Swain has suggested is sometimes true in the nation as a whole?[123] Is the black electorate, as such conservative pundits as Clint Bolick suggest, much less liberal than the black elite, in which case differences between the voting records of black and white members of Congress would prove that black interests would be better represented by white faces?[124]

The most easily accessible and comprehensive index of ideological patterns of behavior in congressional roll calls is *Congressional Quarterly*'s "Conservative Coalition Scores," which are based on 60-100 roll calls per session on a wide range of subjects and are published annually. The scale varies from 0 to 100, with 100 being the most conservative, as *CQ* determines it.[125] Figure 1, which summarizes 23 years of data succinctly, demonstrates that black and white members of Congress from North Carolina do *not* vote similarly.

(Figure 1 about here)

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[123]Swain, *Black Faces, Black Interests.* Much of Swain's book is based on interviews with members of Congress, in which they apparently told her what she seemed to want to hear, and she believed them. When more quantifiable or systematic data disagrees with her interview impressions, as in the section on North Carolina congressman Tim Valentine, pp. 159-68, Swain trusts her impressions.

[124]Bolick, "Ask the Tough Questions on Civil Rights," *Los Angeles Times*, Feb. 22, 1993, p. B5.

[125]The advantages of the index over those of the AFL-CIO Committee on Political Education, the Americans for Conservative Action, the Americans for Democratic Action, the Leadership Conference on Civil Rights, etc. are that it contains more roll calls and that it is on a larger range of issues. A few deviant votes will have little effect on the *CQ* index. Its advantage over one that is invented especially for a particular piece of research is that the inventor might consciously or unconsciously bias her index to fit the needs of the moment, or make some error in calculating it. Anyone can recheck the *CQ* scores.

To test whether the Conservative Coalition (CC) scores of members of Congress from North Carolina were similar to those on interest group indices, I correlated the CC scores for 1987, 1988, 1990 and 1992 for the 11 North Carolinians on their ratings from the Americans for Democratic Action (ADA), the AFL-CIO (AFL), the U.S. Chamber of Commerce (CCUS), and the American Conservative Union (ACU). The matrix of Pearson r's below indicates that the indices are generally rather closely related.

			Index	
Index	ADA	AFL	CCUS	ACU
CC, 1987	.66	.78	.81	.76
CC, 1988	.75	.58	.71	.77
CC, 1990	.83	.83	.69	.78
CC, 1992	.85	.92	.93	.89

The members of Congress from the state have been grouped into three categories and the scores for each category have been averaged:[126] Republicans, Democrats from the two most heavily black districts (the First and Second until 1993, then the First and Twelfth), and Democrats from other districts. The pattern is striking. Republicans consistently scored about 90% conservative. Other Democrats averaged around 70%, but varied from the low 60s to the low 80s in particular years. The two white Democrats from districts One and Two acted like Republicans until 1980, and then somewhat more like other Democrats.[127] The huge anomaly in the figure came when two black Democrats, Eva Clayton and Mel Watt, replaced whites in the two "black districts" after the 1992 election. Suddenly, a conservative index that had been nearly 90% in 1991 and 60% in 1992 became 11%.[128] In North Carolina, the color of the member of Congress makes a major difference in roll call voting. To repeal the 1992 redistricting is to exclude the voices of the black community from Congress.[129]

In her opinion in *Shaw* v. *Reno*, Justice O'Connor suggested that representatives from majority-minority districts may be "more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole."[130] Blacks who have run for Congress in North Carolina have often denied this uncharitable presumption. To take merely one example, in a 1983 article with the title "Black lawmakers don't want to be just spokesmen for

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[126]Because some members were present for different numbers of the relevant roll calls, I divided each member's conservative score by the sum of his conservative and anti-conservative scores. For instance, a congressman who joined the conservative coalition on 80% of the total roll calls, opposed it on 5%, and was absent on 15% would be credited with a score of 94 (80/85 = 94). I then averaged these scores over the number of members who fell into the category.

[127]In particular, Tim Valentine's Conservative Coalition score from his first election in 1982 through 1993 was very similar to that of his predecessor, L.H. Fountain.

[128]This was not just an effect of a new Democratic administration and two first-term members of Congress. The 1993 scores of Mel Watt and Eva Clayton are almost identical to the average of the Conservative Coalition scores of all other African Americans elected to Congress from the eleven ex-Confederate states for every session since 1972. This implies that if districts in which African Americans had an opportunity to elect candidates of their choice had been drawn earlier in North Carolina, the people elected would have voted very differently from other representatives from the state.

[129]In her concurring opinion in *Davis* v. *Bandemer*, 106 S.Ct. 2797 (1986), at 2820, Justice O'Connor suggested that individual members of traditionally protected minority groups could be protected as group members against political discrimination if "the racial minority group can prove that it has 'essentially been shut out of the political process.'" (citation omitted) Figure 1 would seem to constitute such proof.

[130]113 S.Ct. at 2827.

minority group," Kenneth Spaulding, then head of the Black Caucus in the state legislature, declared that "The benefit minorities have in the General Assembly is they can express views for people, black or white, who have not had opportunities to be a part of the American dream. . . . When you represent a district, you represent everyone in that district."[131] But even if this was mere rhetoric, even if aspiring African-American politicians in a state that was three-fourths white catered only to their small minority constituency, Figure 1 suggests that the statement would apply at least as strongly if one substituted "majority-majority" for "majority-minority" and white representatives for black. That is, as observers noted and as their roll call behavior indicates, white politicians in North Carolina have overwhelmingly considered their "primary obligations" to be to whites, while they have largely ignored the opinions of the black parts of their constituencies, opinions which the following section shows are very different from those of the white electorate.

2. ATTITUDES OF THE ELECTORATE

But was this just the behavior of white and black elites, which might differ markedly from the opinions of the masses of white and black voters? Drawing on the University of Michigan National Election Studies, as well as on the most extensive survey of black political opinion yet made, the National Black Election Study, Katherine Tate documents the marked divergences in beliefs and opinions between blacks and whites and the relatively few systematic differences on these opinions within the black community.[132] In 1988, for instance, 55% of whites, but only 28% of blacks in the nation as a whole opposed a guaranteed jobs program; 54% of whites, but only 26% of blacks opposed federal aid to minorities; 34% of whites, but only 15% of blacks believed social services spending should be cut.[133] In 1984, blacks were substantially more liberal than whites on the issues of jobs, food stamps, medicare, federal aid to education, capital punishment, and defense spending.[134] The relatively slight divisions among African-Americans could only rarely be explained by differences in

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[131]Gene Wang, "Black lawmakers don't want to be just spokesmen for minority group," *RN*, Jan. 30, 1983.

[132]*From Protest to Politics: The New Black Voters in American Elections* (Cambridge, MA: Harvard Univ. Press, 1993). See, similarly, Michael C. Dawson, *Behind The Mule: Race and Class in African-American Politics* (Princeton, N.J.: Princeton Univ. Press, 1994), especially Table 8.1, pp. 183-84.

[133]Id., at 34.

[134]Id., at 36-39.

incomes, genders, or regions. Middle class and working class, male and female, southern and non-southern blacks largely shared the same attitudes with each other, but not with whites.[135]

Blacks also differ significantly from whites in their perceptions of the degree of prejudice and discrimination in American society and in their beliefs about the causes of inequality, perceptions and beliefs that have a profound influence on the political programs that people favor. In *Black Americans' views of racial inequality: The dream deferred*,[136] Lee Sigelman and Susan Welch catalogue a series of disturbing and profound divergences between whites and blacks. For instance, in 1989, 26% of blacks thought that over half of the whites in America "personally share the attitudes of groups like the Ku Klux Klan." Only 4% of whites considered the KKK mainstream.[137] In the same year, the percentages of blacks and whites who perceived the existence of discrimination against blacks in education were 37% and 11%, respectively; in housing, 52% and 20%; in getting unskilled labor jobs, 49% and 10%; in getting skilled labor jobs, 53% and 15%; in getting managerial jobs, 61% and 23%; in wages, 57% and 14%.[138] In a word, the vast majority of whites do not perceive that there is much racial discrimination in any area of American life, while the majority of blacks see it everywhere. And such divergences in perceptions lead to differences in policy preferences. 49% of blacks, but only 9% of whites in 1984 thought that past discrimination against blacks justified giving blacks preferences in getting jobs over equally qualified whites.[139]

A 1993 survey on racial attitudes in North Carolina sponsored by the Z. Smith Reynolds Foundation, Inc. of Winston-Salem suggests that citizens of the state mirror national trends. In Table 1, I have excerpted a few of the answers to the large number of questions asked of the respondents, divided them into four categories, and listed the percentages of each race holding the indicated attitudes. Panel A shows that whites and blacks differed in their beliefs about the extent of prejudice and racial discrimination in North Carolina in 1993. One in five blacks, but only one in twenty whites considered race relations or discrimination one of the most important problems facing the state. More than twice as many blacks as whites considered racial discrimination in the state very serious and increasing. Nearly twice as high a percentage of blacks as whites agreed very strongly that most

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[135]Id., at 38-45.

[136]Cambridge, Eng.: Cambridge Univ. Press, 1991.

[137]Id., at 53.

[138]Id., at 57.

[139]Id., at 129.

whites in the state are prejudiced, and nearly three times as many thought most whites "want to keep blacks down."

(Table 1 about here)

Panels B and C demonstrate even wider racial differences concerning the degree of private and public discrimination in contemporary North Carolina. African-Americans were three to four times as likely as whites to believe that there is anti-black discrimination in jobs, housing, education, public accommodations, scholarships, local government, and law enforcement. Whites were more likely than blacks to perceive anti-*white* discrimination in jobs and scholarships by nearly a seven to one margin, and to think that the federal and state governments have done "too much to help blacks achieve equality" by thirty to one. Five times as high a proportion of blacks as whites considered "equal justice for minorities in North Carolina" a major problem. Panel D shows that members of the two races differed markedly on important governmental policies: banning housing discrimination, affirmative action in college admissions or employment, and busing schoolchildren for integration. In sum, in North Carolina, as in the nation as a whole, whites and blacks see entirely different worlds. In the white view, there is little remaining prejudice or public or private discrimination, and there is consequently little need for government programs to do something about it. In the black view, prejudice and discrimination are pervasive, and governments at all levels should act to remedy this serious plight. It is not a large inferential leap to connect constituents' attitudes revealed in these surveys with the congressional voting patterns portrayed in Figure 1.

While it is true that both communities generally agreed on such issues as crime, and that whites in 1993 rarely assented to statements that exhibit traditional white supremacist or segregationist attitudes, the gulfs between blacks' and whites' perceptions of discrimination and bias and the resulting wide differences in policy preferences are dramatic. Observers, including legislators and judges, may decry the separation of attitudes and deplore or disagree with the differences in perception, but it is surely not irrational to act as if the differences existed.[140] These are not stereotypes, but very real disparities of view. Even if legislators in 1991-92 did not know the exact results of the 1993 survey, they must be assumed to be generally aware of their constituents' opinions through personal contacts, the news media, and their own experiences. Unless districts are drawn with an eye to reflecting the opinions of the 22% of North Carolinians who are black, those opinions, which deviate so markedly from those of the white majority, will be disproportionately unrepresented or even silenced in legislative bodies.

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[140]As Justice Souter pointed out, *Shaw* v. *Reno*, at 2845, n.2. In *Batson*, *supra*, n. XXX, at 1727, Justice Marshall explained carefully that the equal protection clause "prohibits a State from taking any action based on crude, *inaccurate* racial stereotypes" -- not accurate generalizations. Italics supplied.

B. DISCRIMINATORY DISTRICTING AND ELECTORAL PRACTICES BEFORE 1991

1. THE "BLACK SECOND," 1872-1901

The racial and partisan gerrymandering of congressional districts in North Carolina did not begin in 1991, nor were the 1990s the first time that the shape of congressional districts in the state has attracted widespread adverse comment. In fact, less than two years after the ratification of the Fifteenth Amendment in 1870, the Democrats, who attained a majority in the legislature through extensive violence and intimidation against black and white Republicans, packed African-Americans into the "Black Second," the only congressional district in the South during the era to have its own published biography.[141] The compact southeastern Second District drawn by the Republicans in 1867 contained a small white majority, a total population that was eight percent below that of the ideal in the state, and had only twenty percent more black citizens than could be expected if the state's black population had been divided equally in the nine congressional districts.[142] From the Democratic reapportionment of 1872 until disfranchisement in 1900, the district contained substantial black majorities, from ten to eighteen percent more total population than the average district in the state and, most important, it had approximately twice the number of blacks as an equal division would have dictated. Since the other districts were "stacked" to insure that there was no black majority, the apportionment effectively confined black control in a state that was approximately a third African-American to a maximum of one district in eight or nine (depending on the total population in the decade), and minimized black influence and Republican representation in all the other congressional districts. Republican Governor Tod Caldwell described its shape as "extraordinary, inconvenient and most grotesque."[143] Nineteenth century transportation and communication made the district much less accessible than any district in North Carolina today.

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[141]Eric Anderson, *Race and Politics in North Carolina, 1872-1901: The Black Second* (Baton Rouge, LA: Louisiana State Univ. Press, 1981). Other notorious discriminatory racial gerrymanders of congressional districts in the South after Reconstruction included the "shoestring district" in Mississippi, the Black Belt Fourth District in Alabama, and the "boa constrictor" Seventh District in South Carolina. On these districts, see Kousser, "How to Determine Intent," *supra*, n. XXX, at 598-606.

[142]Data from Stanley Parsons *et al.*, *United States Congressional Districts and Data, 1843-1883* (1986); Parsons *et al.*, *United States Congressional Districts, 1883-1913* (1990). Congress enfranchised southern blacks in 1867 in the Reconstruction Act. Eric Foner, *Reconstruction* (New York: Harper and Row, 1988), at 276.

[143]Quoted in Anderson, *Black Second*, 3.

It was only after the violently racist "White Supremacy Campaign" of 1898 and the fraudulent passage in 1900 of the disfranchisement amendment, with its literacy test, poll tax, and temporary grandfather clause, that the vast majority of blacks were excluded from politics and from a fairly equal share of the benefits that the state and local governments provided.[144] At that point, it was safe for the Democrats to reduce the Second District's population, and especially the number of blacks in it, to a more compact size and a population more nearly equal to that of the state's other congressional districts.

What distinguished the redistricting of 1991-92 was not that it was motivated by race or partisanship, for these motives had determined the composition of districts 120 years before. What was different in 1991-92 was that, for the first time in the long history of racial and partisan gerrymandering in North Carolina, blacks, not whites benefited, and some whites concluded that now the rules needed to be changed.

2. RACIAL SUPPRESSION, 1900-68

For a state in the "Rim" or "Border" South with a cherished progressive self-image, North Carolina suppressed black political activity thoroughly during the period of the "nadir" of race relations in the first half of the twentieth century and only slowly, grudgingly, and partially liberalized thereafter. Only 15% of the state's blacks were registered to vote in 1948, and only 36% in 1962. Because of low overall voter registration and its continued use of a literacy test, 40 of the state's counties were subject to Section 5 of the Voting Rights Act in 1965. A year later, black registration finally surpassed 50% for the first time since 1900. While Tennessee elected its first black of the century to the General Assembly in 1964 and abolished multimember districts in urban counties in 1965 on the grounds that they discriminated against blacks, North Carolina did not elect a black state legislator until 1968, and it refused at that time to abolish multimember districts for the state legislature, even though it was advised that they might be challenged in court on the grounds of racial discrimination. It simultaneously passed a numbered post system with an anti-"single shot" provision, subsequently outlawed as racially discriminatory, over the protests of blacks and white Republicans who charged that it would have a discriminatory impact. The same legislature that adopted the multimember district/numbered post system also refused to add black activist Durham County to the Second Congressional District, reportedly to prevent a rise in black influence in that district.[145]

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[144]Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910* (New Haven, CT: Yale Univ. Press, 1974), 182-95.

[145]Harry Watson Testimony, *Gingles* v. *Edmisten* (1983), 242, 255, 300-07; Plaintiff-Intervenor's Exhibit 25 in *Shaw* v. *Hunt*; Kousser, "Was Memphis's Electoral Structure Adopted or Maintained for a Racially Discriminatory Purpose?" Caltech Social Science Working Paper 807 (Aug., 1992), at 45-47. The anti-single-shot law was declared unconstitutional in *Dunston* v. *Scott*, 336 F.Supp. 206 (E.D.N.C. 1972).

3. CLAYTON AND LEE RUN FOR CONGRESS

1968 was not only the year when Henry Frye of Greensboro became the first African-American elected to the General Assembly, but also the year when Dr. Reginald Hawkins, a black Charlotte dentist, received 129,808 votes for the Democratic nomination for governor and when Eva Clayton became the first black since 1898 to run a serious campaign for Congress.[146] When Clayton, who had never previously held public office, began her campaign, blacks made up approximately 40% of the population of the Second District, but only 11% of the voters. Although her poorly financed and rather amateurish campaign lost 70-30 to eight-term incumbent L.H. Fountain, the most conservative Democrat in the state's congressional delegation, Clayton and her cadre of black activists managed to raise black registration to 26% of the district's voters.[147]

Four years later, in 1972, Howard Lee became Fountain's second and much more serious black challenger. The son of a Georgia sharecropper, Lee had come to Chapel Hill to attend graduate school in social work at the University of North Carolina in 1961 and stayed on in a job at Duke University. He had been narrowly elected to the largely ceremonial office of mayor of the majority-white town of Chapel Hill in 1969 and reelected in 1971, and as the first black mayor in the state during the twentieth century, had been named vice-chairman of the state Democratic party in 1970. An impressive speaker with an ability to appeal to whites, he had flirted with the idea of running for Lieutenant Governor, but when the legislature added Orange county to the Second District in its principal change in congressional district boundaries in 1971, Lee decided to follow in Clayton's path. Expecting to capitalize not only on increased black registration, but on an appeal to white youths newly able to register after the institution of the 18-year-old vote, Lee hoped that whites would look beyond his race. Blacks in politics, he declared, needed to be "concerned about people on the basis of character rather than skin color." "I have been working awfully hard," he said on another occasion, "to establish a relationship between myself and members of the white community."[148]

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[146]"This Political Hint No Surprise," *Raleigh Times* (hereinafter "*RT*,") Sept. 4, 1970; *RN*, Nov. 8, 1970; Baran Rosen, "Mayor Howard Lee Campaigning Hard to Unseat Rep. Fountain," *RN, Mar. 13, 1972.*

[147]Baran Rosen, "Mayor Howard Lee Campaigning Hard to unseat Rep. Fountain," *RN, Mar. 13, 1972.*

[148]"Mayor Advises 'People Power,'" *RN*, April 29, 1970 (first quotation); *RN*, July 16, 1970; "This Political Hint No Surprise," *RT*, Sept. 4, 1970; "Under The Dome: Lee, Futrell said eyeing lieutenant governor race -- Is Lee using threat to run as lever to get party post?" *RN*, Sept. 6, 1970; "Party Names Lee As Vice Chairman," *RT*, Nov. 16, 1970; "Wide Margin Re-Elects Lee As Mayor of Chapel Hill," *RN*, May 5, 1971; "Under The Dome -- Chapel Hill's Howard Lee may run against Fountain," *RN*, Sept. 21, 1971;Baran S. Rosen, "Lee Announces 2nd District Bid," *RN*, Jan. 11, 1972; Rosen, "Youth, Black Voters Boost Lee's Race," *RN*, Feb. 20, 1972; Rosen, "Mayor Howard Lee Campaigning Hard to Unseat Rep. Fountain," *RN*, March 13, 1972 (second quotation).

Optimistically, Lee proposed a budget of $75,000 in his campaign and aimed at raising black registration from 26% to 35% of the total eligible to vote in the district. For the first time since his initial election in 1952, L.H. Fountain appointed campaign managers in every county, ran radio and television advertisements, and handed out bumper stickers. Termed by Tom Wicker of the *New York Times* "an archetypical Southern conservative, whose large black constituency has had little if any effect on his unyielding position on racial and social issues," Fountain still wore white linen suits and white shoes on the floor of Congress in 1972 and had no blacks on his staff. Despite his vigorous campaign, which represented the "toughest challenge" of Fountain's career, Lee raised the black registration percentage only to 30%, and he lost in the primary, 59% to 41%. According to Daniel C. Hoover of the *News and Observer*, "Although [Lee] got some white votes, especially in his own traditionally liberal Chapel Hill area, the balloting generally was along racial lines." Being "a highly skilled campaigner with strong appeal not only to blacks but to liberal urbanites as well" was not enough to win an overwhelmingly rural Second District in which voting was widely understood to be markedly racially polarized.[149]

4. THE 1981 REDISTRICTING: FOUNTAIN'S FISHHOOK

The 1981 congressional redistricting is worth studying in detail because it illustrates four important facts: First, before 1991, white congressmen openly manipulated redistricting to buttress their positions against candidates who might appeal to black voters. Second, racial, partisan, and incumbent-protecting goals interacted, often producing unlikely coalitions because of the "ripple effects" of changes in one district on the shape of another. Third, the Voting Rights Act, as interpreted at the time by the Department of Justice, constrained racially discriminatory legislative actions -- but not very much. Fourth, although committees paid lip service to the value of compactness, legislators did not hesitate to sacrifice it to what they obviously considered the more important ends of protecting racial, partisan, and incumbent interests. This represented no change from previous *de facto* state policy. As Republican Congressman James T. Broyhill commented: "One only has to look at the outline of the North Carolina congressional districts to know that

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[149]"Howard Lee Running Short On His Campaign Funding," *RN*, March 31, 1972; Baran S. Rosen, "Rep. Fountain Is Running Hard," *RN*, April 9, 1972; Wicker, "Lee vs. Fountain in Second District," *RN*, April 19, 1972; "Rep. Fountain weathers toughest challenge," *RT*, May 8, 1972; "Fountain Victorious," *RN*, May 8, 1972; Daniel C. Hoover, "Lee Hints Sanford Support," *RN*, May 11, 1972 (first quotation); "Under the Dome -- Lee slates announcement of entry into No. 2 contest," *RN*, Mar. 2, 1976 (second quotation). In 1976, a black former World Bank official, Elbert G. Rudasill, joined two other challengers to Fountain and received only 9% of the vote in a minor campaign. Fountain's chief opponent, six-term state legislator J. Russell Kirby, nearly managed to force the incumbent into a runoff. Martin Donsky, "Fountain Faces Unusual Competition," *RN*, July 22, 1976.

compactness has not been a consideration in the past."[150] During the 1950s and 60s, the state's congressional districts were derided as "bacon strips" with "tortuous" boundaries. The Fourth District in 1966 was contiguous only at a pinpoint.[151]

Unless the standards of redistricting, the population distribution, partisan control, or the number of seats in the body shift markedly from one decade to the next, redistricting begins with the status quo and generally ends close to it. It was a sign of how much was at stake in relatively small changes that it took six months to reach agreement on how to revise the state's eleven districts. During the bitter protracted conflicts, a joint committee collapsed, a "super subcommittee" came to nothing, an agreement on a plan by five Democratic congressmen was ignored, committees of both houses stalled and reversed themselves, a committee-endorsed proposal was shelved on the floor, the majority party lost control of the process, and the final plan was then vetoed by the Department of Justice.[152] Basically, the controversy involved three districts: In the Second, L.H. Fountain's friends sought to protect him against adding activist blacks and some liberal whites in Durham to his rural district, and even sought to reduce the black percentage in order to diminish any potential challenge from someone whose political views resided in the ample space to Fountain's left. In the Sixth, Richardson Preyer's allies wanted to overturn his 1980 upset by Republican Eugene Johnston and return the state's most liberal congressman to Washington. But since increasing the proportion of Democrats in Preyer's district would inevitably reduce that in the Fifth, where Stephen L. Neal never had an easy contest, Neal's backers attempted to forge an alliance with Republicans to bolster the Democratic majority in his district by shifting Republican areas into the Sixth and Democratic counties into the Fifth. The desperate Preyer ended up trying to arrange a tacit agreement with Fountain, the state's most conservative Democrat.[153]

The principal controversy in 1981 was over whether to move Durham county into Fountain's Second District or to move Orange out of it and join Durham, Orange, and Wake counties into a new

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[150]Broyhill to Helen R. Marvin and J.P. Huskins, Feb. 20, 1981, in files of the Joint Redistricting Committee (hereinafter referred to as "JCR files"). The committee's files contain a copy of a 1981 congressional bill that sought to mandate that districts be "compact in form." It is instructive to note that the bill, which did not pass and which the North Carolina took no recorded action on, states in paragraph (h) that "Nothing in this section shall be construed to supersede any provision of the Voting Rights Act of 1965."

[151]Douglas Milton Orr, Jr., *Congressional Redistricting: The North Carolina Experience* (Chapel Hill, N.C.: Department of Geography, Univ. of North Carolina, 1970), 55, 63-64, 69-70.

[152]For a barebones overview of the process, see Terrence D. Sullivan to Alex K. Brock, "Legislative process resulting in enactment of congressional redistricting act," Sept. 11, 1981, in JCR files. Newspaper stories, to be cited individually at appropriate points, flesh out the skeleton.

[153]A.L. May, "Most redistricting plans seen as hurting Fountain," *RN*, May 16, 1981; "Under the Dome: Redistricting forcing strange alliances," *RN*, May 31, 1981.

"Research Triangle" district.[154] Nearly every time Durham's name came up during newspaper discussions of redistricting, which was in nearly every story for several months, the papers' writers reminded readers, who naturally included congressmen and state legislators, that (to take a typical example) "The likely political impact would be to assure Fountain of tough Democratic primary opposition from Durham Democrats, including black candidates."[155]

The first preference of black leaders who testified in hearings, as well as two of the three black legislators who served on the large committee, Daniel T. Blue, Jr.(D-Wake), Kenneth Spaulding (D-Durham), and Henry E. Frye (D-Forsyth) seems to have been to keep Orange county in the Second District and add Durham.[156] When Willie C. Lovett and Lavonia Allison of Durham testified in favor of such an arrangement, *Raleigh News and Observer* capital correspondent A.L. May noted that "While Lovett and Ms. Allison didn't mention it, black leaders have said that a new district with Durham and liberal-voting Orange might give blacks a good chance to elect a black congressman."[157] Spaulding drew up a map with both Durham and Orange, but not Fountain's home county, Edgecombe, in the Second District.[158]

Many white legislators and congressmen agreed with the move to add Durham to the Second District because of the ripple effects elsewhere. In fact, four of the first five major plans that the Joint Committee on Redistricting considered placed Durham in Fountain's bailiwick. Putting Durham in the Second would necessitate shifting rural territory to Walter Jones's First District, a prospect that he liked, and it would probably pull the Sixth District east or south, enabling Stephen Neal's Fifth District to pick up Democratic areas, especially Rockingham county, from the Sixth. Early attention thus centered on a plan by Neal ally Rep. Ted Kaplan (D-Forsyth), which gained the endorsement of Jones and Neal and picked up three more southeastern congressmen, Bill Hefner, Charles Rose, and Charles Whitley, by changing their districts as little as possible. "From the outset," noted the *News*

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[154]Although there was no legal necessity to keep counties intact in drawing congressional districts, the state had done so by convention before 1981.

[155]A.L. May, "5 officials back plan on districts," *RN*, May 14, 1981.

[156]Henry E. Frye (D-Forsyth) presented a map that put Durham into the Second District, but deleted Orange. Frye appears to have been more concerned with making the Sixth District, where he lived, winnable by a liberal Democrat than with the exact composition of the Second District. Senate Congressional Redistricting Committee Minutes, June 1, 1981; "Under the Dome: Redistricting forcing strange alliances," *RN*, May 31, 1981. For Blue's preference, see Steve Tomkins, "Triangle district appears certain," *RT*, July 2, 1981.

[157]A.L. May, "Wake, Durham voting split urged," *RN*, April 17, 1981.

[158]JCR files, May 15, 1981.

and Observer's capital insider column, "Kaplan's purpose was to protect the interest of his congressman, Stephen L. Neal, a Winston-Salem Democrat." To break the momentum of the Kaplan Plan, which reportedly had solid commitments from majorities of both the Senators and the House members on the Joint Committee, Sen. Dallas L. Alford, Jr. (D-Nash) proposed to join Durham, Orange, and Wake in a Research Triangle district and to stretch Fountain's Second halfway across the top of the state from Caswell county in the middle to Dare county on the coast. Kenneth Spaulding protested that this violated one of the subcommittee's criteria, compactness. As A.L. May noted, "Alford is one of several lawmakers from Fountain's district who is trying to protect the congressman's interests. The major fight is over whether to put Durham in the Second and probably placing strong Democratic primary opponents, including black candidates, against the conservative Fountain."[159]

As the Joint Committee on Redistricting and its various subcommittees sputtered, Fountain's staff drew up a proposal to abandon the state's long tradition of not splitting counties, and Preyer and his allies joined in the effort. When the Co-chair of the Joint Committee, Sen. Helen Marvin (D-Gaston) submitted a plan liberalizing the Sixth District by adding Orange to it, thereby increasing Preyer's chances to regain the seat, even the Republicans, who controlled 20 percent of the seats in the legislature, began considering alliances with the different Democratic factions.[160] With Kaplan's plan drawing support from Republicans and from Democrats outside the Second and Sixth Districts, House Speaker Pro-Tem Allen C. Barbee (D-Nash), a Fountain supporter, took advantage of the illness of the committee chairman to adjourn a May 28 meeting before Kaplan's plan could be voted on, thereby so angering the Senate members that they completely abandoned the Joint Committee, leaving each house to draw its own plan.[161]

When the Senate committee five days later approved the Kaplan plan over the objection of Fountain ally Alford, the *Raleigh Times* explained that "Fountain's supporters in the House want counties split so the Second can avoid being lumped in with Durham's large black population. Legislators from the area have said privately that they're afraid a black candidate could defeat

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[159]Walter Jones, Charles O. Whitley, Stephen L. Neal, Charles Rose, and W.G. Hefner to Sen. Helen Marvin and Rep. J.P. Huskins, May 13, 1981, in JCR files; A.L. May, "5 officials back plan on districts," *RN*, May 14, 1981; May, "Most redistricting plans seen as hurting Fountain," *RN*, May 16, 1981; May, "Panel tosses out 2nd District plan," *RN*, May 19, 1981; "Under the Dome: Redistricting forcing strange alliances," *RN*, May 31, 1981.

[160]A.L. May, "Backers of Fountain want districting tradition ended," *RN*, May 20, 1981; "Dividing counties may break deadlock over redistricting," *RT*, May 21, 1981; William M. Welch, "Dealing: GOP lurking in shadows of redistricting fight," *RN*, May 25, 1981; Paul T. O'Connor, "Plan would put townships in 2nd District," *RT*, May 27, 1981; A.L. May, "Proposed plan on redistricting splits counties," May 27, 1981, *RN*; "Under the Dome: Redistricting forcing strange alliances," *RN*, May 31, 1981; Richardson Preyer to Sen. Helen Marvin, May 29, 1981, in JCR files.

[161]"Congressional redistricting decision derailed," *RT*, May 28, 1981; A.L. May, "Redistricting panel split by walkout," *RN*, May 29, 1981; "Committee OKs plan to split Wake, Durham," *RT*, June 2, 1981.

Fountain in the Democratic primary. They say that would lead to defeat in the general election, however."[162] On the Senate floor, Majority Leader Kenneth C. Royall, Jr. (D-Durham), another Fountain friend, blocked acceptance of the committee proposal. "Not only would urban Durham disturb the rural nature of the Second District," A.L. May remarked in the *News and Observer*, "but the Fountain supporters are worried the county would present Fountain with serious Democratic primary opponents, including strong black candidates." As the newspaper stories, based on interviews with often unidentified legislators, make clear, race, partisanship, incumbent protection, and preserving a rural community of interest inspired Royall and Barbee to propose a plan removing Orange from the Second District, keeping Durham out, and moving more Republican voters into the Sixth District to attract Republican legislators and followers of Fifth District Congressman Neal.[163] Explicitly noting that their scheme reduced the black population proportion in the Second to 37%, Royall contended that such a change was not large enough to count as retrogressive.[164] A directly parallel process took place in the House: After a long deadlock and a rejection of several split-county plans, the Redistricting Committee voted out a plan that put Durham into the Second District and buttressed Democratic support in the Sixth District, only to be overcome on the floor by a coalition of supporters of Democratic Congressmen Fountain, Neal, and Hefner and all the Republicans. The final proposal was similar enough to that of the Senate that slight compromises in a conference committee brought the six-month struggle to what legislators hoped was an end.[165]

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[162]"Committee OKs plan to split Wake, Durham," *RT*, June 2, 1981. Apparently torn between his desires to have the Sixth District tailored to Preyer's interest and to make it more likely that a candidate favorable to blacks would be elected in the Second, Sen. Henry Frye abstained on the roll call. A.L. May, "Proposal to shift Durham to Fountain's area advances," *RN*, June 2, 1981.

[163]May, "Fountain backers stall redistricting plan," *RN*, June 4, 1981; May, "Consensus grows for Triangle district," *RN*, June 5, 1981; untitled story, *RT*, June 5, 1981.

[164]A.L. May, "Senator says plan violates guidelines," *RN*, June 6, 1981.

[165]A.L. May, "House is key to redistricting compromise," *RN*, June 7, 1981; untitled story, *RT*, June 10, 1981; May, "Panel abandons county-splitting boundary plan," *RN*, June 12, 1981; JCR Files, House Subcommittee on Congressional Redistricting Minutes, June 15, 17, 1981; May, "Proposal would split 5 counties," *RN*, June 16, 1981; "House panel rejects split-county district proposal," *RT*, June 17, 1981; May, "House panel rejects county-splitting redistricting plan," *RN*, June 18, 1981; May, "Splintered counties, Triangle district in new plan," *RN*, June 19, 1981; "Redistricting plan rejected in House unit," *RT*, June 23, 1981; May, "Panel rejects proposal to split counties," *RN*, June 24, 1981; May, "After redistricting drafts, pressured panel backs plan," *RN*, June 26, 1981; "Congressional district proposal voted down," *RT*, June 26, 1981; May, "Four plans ordered in search for district realignment," *RN*, June 27, 1981; "Panel OKs plan to cut Durham from 4th," *RT*, June 30, 1981; May, "House panel breaks redistricting deadlock," *RN*, July 1, 1981; Steve Tomkins, "Triangle district appears certain," *RT*, July 2, 1981; May, "Redistricting plan OK'd by House keeps Durham out of 2nd District," *RN*, July 2, 1981; untitled article, *RT*, July 3, 1981; "Conferees OK Triangle district," *RT*, July 8, 1981.

Since the Second District favored by Fountain's defenders curved around Durham and picked up Alamance and Chatham counties, it became known as the "fishhook" district. Rotated ninety degrees, the Second bore a striking resemblance to the original 1812 Massachusetts district that made Elbridge Gerry's name notorious, as the *News and Observer* pointed out in an editorial criticizing the district as "clearly not compact. It shows that in drawing districts for a specific political purpose, 20th century North Carolina legislators are not much different from their counterparts in 19th century Massachusetts." "The Legislature," the paper noted in another editorial a few days later, "has given the state districts that are hooked, humped, and generally ungainly -- in a word, gerrymandered -- to protect incumbents."[166] But the solons, including most especially the Republicans, rejected calls from House members Patricia S. Hunt (D-Orange) and Daniel T. Blue to create more compact districts that crossed county lines, and they voted down Hunt's plan to do so in a manner that would assist Richardson Preyer in regaining his congressional seat. As finally passed, the bill was a bipartisan gerrymander which, the *News and Observer* noted, "helped [Eugene] Johnston, a conservative Republican, and Fountain, an old-time conservative Democrat who frequently votes contrary to the Democratic majority in the House."[167] In a report on redistricting in 32 states, Common Cause named the North Carolina Second District as one of the two "infamous gerrymanders" of the year.[168]

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[166]"1812 critter resurfaces," *RN*, June 6, 1981; "Political protectionism," *RN*, June 10, 1981.

[167]A.L. May, "Splintered counties, Triangle district in new plan," *RN*, June 19, 1981; "Redistricting plan rejected in House unit," *RT*, June 23, 1981; "Political protectionism," *RN*, July 10, 1981.

[168]"Under the dome: Group cites 2nd District gerrymandering," *RN*, Sept. 15, 1981.

5. REMOVING THE FISHHOOK

The NAACP-LDF sued the state and lobbied the Department of Justice. In the name of Ralph Gingles, LDF local counsel Leslie Winner charged the legislature with adopting a congressional plan that had both the purpose and the effect of diluting black political strength. In addition, the suit challenged the degree of population inequality in both the congressional and legislative plans and the continued use of multimember districts on the state level. Asked why the body had allowed population variations of up to 24% between the largest and smallest districts in the General Assembly, Daniel T. Liley (D-Lenoir), co-chair of the House Legislative Redistricting Committee, replied that "We were simply hoping nobody would challenge it."[169]

In December, 1981, before the suit could be heard by a three-judge panel, the U.S. Department of Justice rejected the congressional plan. In his Section 5 letter to Alex K. Brock, Director of the State Board of Elections, Asst. Attorney General for Civil Rights William Bradford Reynolds declared that the Justice Department "received allegations that the decision to exclude Durham County from Congressional District No. 2 had the effect of minimizing minority voting strength and was motivated by racial considerations -- i.e., the desire to preclude from that district the voting influence of the politically-active black community in Durham." Reynolds found "particularly troublesome the strangely irregular shape" of the Second District and was also disturbed by the pattern of decreasing black population in the Second District, from 43% in 1970 to 40.2% after the 1971 reapportionment to 36.7% in the plan submitted -- this despite a rise in the black population percentage over that period in the state as a whole.[170]

Editorially chiding the legislature for its long record of racial discrimination in redistricting, the *Raleigh Times* remarked:

> From here on, legislators will be prudent to include, among their standards for drawing districts, not only fair population representation but a fair chance for racial representation. That change is overdue. Until now, districting plans' impact on minority political clout and vice versa has been a behind the scenes concern of the powerful people who draft the plans -- but rarely an on-the-record one.
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> For example, legislative protectors of 2nd District Congressman L.H. Fountain said privately they backed a 'fishhook' district (now thrown out) because they feared a

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[169] "Information on N.C. redistricting asked," *RN*, Sept. 9, 1981; A.L. May, "Suit seeks to invalidate districting plan," *RN*, Sept. 17, 1981; May, "Legislators deny charges in district suit," *RN*, Sept. 18, 1981; May, "Legislature may need to redraw districts," *RN*, Oct. 9, 1981; May, "Legislative leaders OK new session on districts," *RN*, Oct. 10, 1981.

[170] Reynolds to Alex K. Brock, Dec. 7, 1981. The letter was reported in full in Paul T. O'Connor, "Justice nixes N.C. Senate, Congress map," *RT*, Dec. 8, 1981. For comments, see editorial, "Legislators on the hook," *RN*, Dec. 10, 1981. A week earlier, the Department had ruled that the 1968 amendment to the state constitution requiring that whole counties be used in state legislative districts was illegal under the Voting Rights Act. A.L. May, "Ruling due on N.C. redistricting plans," *RN*, Dec. 8, 1981.

more compact one including heavily black Durham County would boost black candidates' chances. In public, they merely said they wanted to keep the 2nd District rural.[171]

Rejecting calls to sue the Justice Department to overturn its denial of preclearance, the legislature decided to redraw its plans. The all-but-formally declared black candidate Mickey Michaux, according to the *Raleigh Times*, "has drawn a map that puts Durham and Orange into the 2nd District. It's a district he believes he'd win." Black leaders in Durham constructed three other, similar maps, which were introduced, along with Michaux's, by Rep. Kenneth Spaulding.[172] But the legislature rejected these efforts of Spaulding's, as well as his repeated attempts to require single member districts in urban areas that contained large black populations. Spaulding correctly predicted that the federal courts would reject the legislature's refusal to remedy the discrimination completely.[173]

Although it did not go as far as black leaders wanted -- it did not keep Orange county in the Second District or eliminate Edgecombe county -- the legislature did add Durham county and eliminate the ungainly projection through Alamance and Chatham counties. As House Redistricting Committee Co-chair J.P. Huskins put it, "We have taken the hook off the fishhook."[174] But the struggle was not easy. As *News and Observer* reporter Daniel C. Hoover noted,

white, conservative eastern legislators fought tenaciously to preserve the traditional 2nd district . . .

Unspoken publicly by some of the legislators were these fears:

-- That when Fountain retires, a black Democrat will be nominated, triggering a white backlash that will deliver the 2nd to the Republicans and form the nucleus for gradual erosion of the Democratic power base there.

-- That Durham's black political activists will fan out over the district and begin registering heretofore apathetic rural blacks, kindle their political awareness and upset the district's grassroots sociopolitical balance."[175]

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[171]"District change coming," *RT*, Dec. 14, 1981.

[172]Paul T. O'Connor, "Politicians don't know where to run," *RT*, Dec. 28, 1981; A.L. May, "2nd, 4th districts to undergo change in congressional redistricting plan," *RN*, Feb. 4, 1982.

[173]"State lawmakers expect approval of redistricting plan," *RT*, Feb. 6, 1982.

[174]Editorial, "Last chance for legislators," *RN*, Feb. 9, 1982; Daniel C. Hoover, "Pleas fail to keep Durham from 2nd," *RN*, Feb. 11, 1982.

[175]Hoover, "Districting woes may have cost Democrats chance to oust GOP," *RN*, Feb. 14, 1982.

In other words, even if it were unsuccessful, a black campaign for Congress might result in the overthrow of the racial and political status quo. The stakes in the redistricting decision could hardly have been higher.

Why, then, did the legislature, which after all numbered only four blacks elected through single-shot voting and apparent private agreements on slates,[176] and 34 Republicans among its 170 members, take the action it did? Pressed explicitly by the Justice Department either to justify its decision to exclude Durham or modify its plan, legislators had no choice, since they knew that a working majority of them had intended to keep Fountain safe from a challenge and since they had so often been reminded of the racial effect of their plan for the Second District. Since changes could be made to Fountain's district without affecting other incumbents' chances significantly, it was easier and less potentially disruptive to comply than to fight. Some were also angry at the tactics of Fountain's confederates. As Joint Redistricting Committee Co-chair Helen Marvin put it, "Time after time it was Congressman Fountain who was trying to dictate to us."[177]

Although the Department of Justice precleared the new plan, which met the criticisms of the fishhook scheme that were specifically raised in Reynolds's objection letter, the LDF did not immediately move to dismiss the congressional portions of the *Gingles* suit. "It's a lot better," commented Leslie Winner, "but it's not good enough." The plan, she said in papers filed with the federal court, perpetuates "the effects of past discrimination against black citizens."[178] Only reluctantly did the LDF two months later drop its challenge to the Second District, contending that although "the districts as apportioned do not allow the black citizens of North Carolina to select representatives of their choosing," the plan "does not appear to violate the United States Constitution or the Voting Rights Act as currently construed."[179]

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[176]Referring unmistakably to Rep. Daniel T. Blue's election to the House in 1980, the *RT* remarked that "Wake and other big multi-seat counties have elected black legislators partly via swapped-support agreements among white and black candidates." Editorial, "District change coming," Dec. 14, 1981.

[177]May, "Legislative panels back plan to shift Durham to 2nd," *RN*, Feb. 19, 1982.

[178]Daniel C. Hoover, "Legislature enacts new redistricting plan, adjourns," *RN*, Feb. 12, 1982; "Congressional district plan gets Justice Department OK," *RT*, Mar. 12, 1982; Hoover, "Congressional districting plan OK'd," *RN*, March 12, 1982; "Fight renewed against redistricting plan," *RN*, Mar. 18, 1982.

[179]"Motion for Partial Voluntary Dismissal," *Gingles* v. *Edmisten*, April 21, 1982. The principal Section 5 precedent at the time, *Beer* v. *U.S.*, 425 U.S. 130 (1976) would have denied relief unless there was demonstrable "retrogression" in potential black political influence, and the legislature had carefully designed the Second District to have the exact same percentage of blacks, to a tenth of a percentage point, in its population in 1982 as in 1971. The 1980 *Bolden* plurality opinion, under strenuous attack in 1982, but not formally modified as of April, required plaintiffs in Voting Rights Act or constitutional challenges to prove that the statute in question had been adopted with a racially discriminatory motive and, more important, seemed to adopt an incoherent approach to evaluating evidence of such intent. See Kousser, "How to Determine Intent," *supra*, n. XXX, at 699-703. The renewed Voting Rights

6. MICHAUX, VALENTINE, AND THE "BLOC VOTE"

Asked for comment about the Justice Department's rejection of the "fishhook" plan in December, L.H. Fountain's spokesman Ted Daniel denied that the Congressman had exercised much influence on the legislative decision. "The congressman said repeatedly that he would have been happy with any district -- including Durham or not."[180] For a month and a half after the legislature turned down his desperate followers' final move to suspend the new plan for thirty days and ask the Department of Justice to reconsider the old one again, Fountain continued to go through the motions of running. Six days after the formal announcement of what promised to be a vigorous and well-funded campaign by Mickey Michaux and the Durham Committee on the Affairs of Black People, however, the 15-term congressman announced his retirement. An unidentified colleague of Fountain's summed up his reasons: "He sort of felt he was let down by (the Legislature) putting Durham County in his district, which he had a lot of apprehension about."[181]

After a brief shakeout of prospective candidates, the contest settled down to a two-white-man race to determine who would face Michaux in the runoff, which, as one candidate put it, "has been the name of the game since day one." Former state House Speaker James E. Ramsey positioned himself in the middle, between the liberal Michaux and Tim Valentine, who had been a state legislator in the 1950s and state chairman of the Democratic party in the 1960s and who sought and won most of the Fountain supporters. Neither Ramsey nor Valentine raised race as an issue in the first primary.[182]

Act with its anti-*Bolden* amendment to Section 2 was signed into law only on June 29, and the Supreme Court's opinion in *Rogers* v. *Lodge*, 458 U.S. 613, which sidestepped *Bolden*, was issued on July 1. In April, 1982, however, the statutory and judicial precedents were considerably less promising. Therefore, dropping the congressional redistricting from the first *Gingles* case is no sign either that the LDF approved the 1981 districts or that they believed them in accord with the Voting Rights Act and the Constitution. Rather, their decision was a matter of legal strategy that might well have been different if it had been taken 75 days later.

[180]Paul T. O'Connor, "Justice nixes N.C. Senate, Congress map," *RT*, Dec. 8, 1981.

[181]"Legislature approves congressional remap," *RT*, Feb. 11, 1982; "Under the dome -- Fountain may face two primary foes," *RN*, Feb. 20, 1982; "Under the dome -- Michaux expected to reveal candidacy," *RN*, March 15, 1982; "Under the dome -- Labor aids Michaux in quest for funds," *RN*, March 18, 1982; A.L. May, "Michaux to announce plans today to challenge Fountain in primary," *RN*, March 22, 1982; A.L. May and Rob Christensen, "Fountain says he won't seek re-election," *RN*, March 28, 1982.

[182]A.L. May and Rob Christensen, "Fountain says he won't seek re-election," *RN*, Mar. 28, 1982 suggested in their story on Fountain's retirement that Michaux would finish first in the primary, but would be forced into a runoff. See similarly May, "Candidates seek runoff, second shot at Michaux," *RN*, June 27, 1982; William M. Welch, "Turnout may decide 2nd District runoff," *RN*, July 19, 1982.

Michaux, who said from the beginning that he "hoped race would not be an issue," acted as though he knew better, deciding not to use billboards with his picture on them and putting most of his early effort into a drive to register black voters. With blacks running for local offices in every county in the Second District, the percentage of the registered voters who were black rose from 27.6% to 30%.[183] The son of an affluent businessman from a well-known Durham family, Michaux had run for the legislature three times in "liberal" Durham county from 1964 to 1968 before finally winning a seat in 1972. After three terms in the legislature, he was rewarded for his early support for Jimmy Carter for President with appointment as U.S. Attorney. Raising more money from labor unions than any other congressional candidate in the state and eventually loaning his own campaign $69,000, Michaux had a sizable staff, as well as assistance in preparing speeches from such notables as Duke political scientist James David Barber.[184] Highly visible and personable, experienced in campaigning among and cooperating with whites, Michaux was as promising a candidate as black North Carolina could produce. To the vast majority of whites in the Second District, however, only one of his characteristics -- his race -- made any difference. Turnout in the first primary was high and voting was racially polarized. Although noting that Michaux's campaign had been geared not only to register more blacks, but to "appeal to white liberals and moderates," A.L. May of the *News and Observer* suggested that the candidate received "a share of the white vote" only in Durham.[185] Statistical analysis by Prof. Richard Engstrom substantiates contemporary newspaper accounts. According to Engstrom, Michaux received 88.6% of the black vote, but only 13.9% of the white vote in the first primary.[186] As became well known all across the country during Jesse Jackson's presidential campaign in 1984, Michaux finished first with 44.1% of the vote, to 32.9% for Valentine and 23% for Ramsey. Overall Democratic turnout in the Second District was 53%, quite high for a primary.[187]

There was only one issue in the runoff. "The veteran politicos tell it simply," A.L. May reported. "Get a black candidate against a white in a runoff primary in rural Eastern North Carolina, and the

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[183]A.L. May, "Michaux to announce plans today to challenge Fountain in primary," *RN*, March 22, 1982; May, "Democrats gird for dogfight in new 2nd district," *RN*, May 23, 1982; *RN*, untitled article based on report of the Joint Center for Political Studies, Nov. 26, 1983.

[184]"Michaux tends to keep race out of campaign," *RN*, June 27, 1982; Daniel C. Hoover, "Michaux reports strong financing by labor committees," *RN*, July 16, 1982; Hoover, "Valentine trails Michaux in funds," *RN*, July 17, 1982; "PACs pumped $1.8 million into North Carolina races," *RT*, Feb. 14, 1983.

[185]May, "Michaux, Valentine runoff appears likely," *RN*, June 30, 1982.

[186]Defendant-Intervenor's Exhibit 13, Table 1, *Shaw* v. *Hunt.*

[187]A.L. May, "Michaux says chances in runoff 'about even,'" *RN*, July 1, 1982.

white will win every time." A dozen Democratic leaders whom he interviewed told May that "the July 27 runoff will boil down to racial bloc voting throughout the district." "I'm afraid it's going to be straight down racial lines," May was told by a Wilson county Democratic leader who, May said, "asked not to be identified."[188] But the conservative Valentine, who had pledged on the evening of his first primary victory not to make race an issue in the runoff, left nothing to chance. Using the code words "bloc vote," a phrase made famous throughout the South by Georgia's Herman Talmadge in his 1948 gubernatorial campaign, Valentine sent a letter to white voters, over his own signature, that warned: "If you and your friends don't vote on July 27, my opponent's bloc vote will decide the election for you." Another target-mailed letter, employing another code word, coyly noted that "My opponent will again be busing his supporters to the polling places." Whites got the message. As one said, leaving the polls, "There wasn't but one choice, Valentine, because he is white."[189]

With turnout at 57%, even higher than in the first primary, Valentine won by a 53.8%-46.2% margin, the voting "strongly following racial lines," according to the *News and Observer.* Prof. Engstrom's statistical analysis confirms newspaper impressions of "widespread bloc voting," as he estimates that 91.5% of the blacks, but only 13.1% of the whites voted for Michaux.[190] Angered by his opponent's resort to a racial appeal, Michaux grudgingly endorsed him a month after the runoff, remarking that Valentine's "only single qualification is that he's a Democrat." Even less conciliatory, the Durham Committee on the Affairs of Black People urged its supporters to write Michaux's name in on the November ballot, rather than voting for the Democratic nominee. Michaux received 14.6% of the votes.[191]

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[188]A.L. May, "Racial support expected to decide 2nd District runoff," *RN*, July 11, 1982.

[189]Ferrel Guillory, "North Carolina still not color-blind -- 2nd District candidates run as symbols," *RN*, July 23, 1982; A.L. May, "Turnout widely considered deciding factor in race," *RN*, July 25, 1982; May, "Valentine wins in 2nd District," *RN*, July 28, 1982; "More blacks move into city jobs," *RT*, Feb. 20, 1984.

[190]A.L. May, "Valentine wins in 2nd District," *RN*, July 28, 1982; editorial, "Race a key in runoff," *RN*, July 29, 1982; A.L. May, "Valentine seeks unity in party," *RN*, July 29, 1982; Daniel C. Hoover, "Write-in vote suggests action in future races, Michaux says," *RN*, Nov. 4, 1982; Defendant-Intervenors' Exhibit 13, Table 1, *Shaw* v. *Hunt.*

[191]"Under the dome -- Michaux reluctant to back Valentine," *RN*, Aug. 11, 1982; A.L. May, "Michaux backs Valentine because 'he's a Democrat,'" *RN*, Aug. 28, 1982; "Michaux endorses Valentine," *RT*, Sept. 18, 1982; "Michaux write-in votes urged by black caucus," *RN*, Oct. 5, 1982; Daniel C. Hoover, "Marin win would defy voting pattern," *RN*, Oct. 31, 1982; Hoover, "Write-in vote suggests action in future races, Michaux says," *RN*, Nov. 4, 1982.

7. POLARIZED ENCORE: VALENTINE BEATS ANOTHER BLACK CANDIDATE

In the legislature in 1973, Michaux had cosponsored a bill to eliminate runoff elections as costly for the state and unfair to blacks. The bill failed. In the wake of Michaux's loss in 1982, Rep. Kenneth Spaulding, another young black lawyer from a prominent Durham family, renewed the effort in a way that was typical of his more moderate and conciliatory stance. Instead of trying to abolish the runoff completely, which he favored, but was sure wouldn't have a chance of passing, Spaulding proposed to require a candidate to obtain only 40%, instead of 50%, to become the nominee for a statewide or federal office. When a subcommittee killed this bill, he modified it again and again, requiring in one version that any first-place finisher who got less than 50% had to beat the second-place finisher by more than five percent to avoid a runoff, and then that the winner had to get 41% and beat his closest opponent by three percent. Both of these measures died, too.[192] It was symbolic of Spaulding's fate. No matter how moderate he tried to become, no matter that he was not as flamboyant as Michaux, no matter that he stressed "fiscal conservatism" in his legislative career and his 1984 congressional campaign, to most whites in the Second District, he was merely another black candidate.

When he opened his campaign against the freshman Valentine in November, 1983, Spaulding made "a plea for biracial support. . . . Minorities side by side with non-minorities should lead this state in a meaningful, open manner." By March, 1984, he was still pushing "an appeal to whites to ignore color. . . . I think the voters, black and white, have moved forward, beyond flesh tone."[193] But like Michaux, Spaulding knew that he could not expect to get many white votes, and that the keys to success lay in registering and turning out blacks. Less well known and less well financed than Michaux and facing an incumbent, instead of running for an open seat, Spaulding had one huge advantage that Michaux had not had: He was on the same ballot as Jesse Jackson. The first black candidate for President in American history with any chance to win a major party nomination, Jackson made a prodigious effort to register enough new black voters to carry the North Carolina primary,

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[192]A.L. May, "Racial support expected to decide 2nd District runoff," *RN*, July 11, 1982; Sherry Johnson, "Legislation would restrict runoffs, pare vote share to win primaries," *RN*, Feb 10, 1983; "Legislation would eliminate need for most runoff primary elections," *RT*, Feb. 10, 1983; "Support solicited for elimination of second primaries," *RT*, Feb. 18, 1983; "Valentine opposes bill to reduce runoff races," *RN*, Feb. 22, 1983; "Valentine hits bill to cut primaries," *RT*, Feb. 22, 1983; "Second primaries," *RN*, March 16, 1983; "Bill on primary election law turned aside by House panel," *RN*, March 18, 1983; "Primaries," *RN*, March 25, 1983; "Primaries," *RN*, April 1, 1983.

[193]Ginny Carroll, "Spaulding launches bid for Valentine's House seat," *RN*, Nov. 30, 1983; A.L. May, "Increase in black voters makes primary a tussle for Spaulding, Valentine," *RN*, March 19, 1984.

especially emphasizing the Second District.[194] White Democrats in the state were less enthusiastic than blacks in choosing between Jackson, Walter Mondale, and Gary Hart.

A markedly smaller proportion of blacks than whites registered to vote in both the First and Second Congressional Districts up through 1982. Although the proportion of blacks in the population in the Second District in 1972 was 40.1%, the African-American population was disproportionately young, so that the percentage of the voting age population that was black was only 34.2%. Whether because of the lingering effects of past discrimination or apathy, the estimated proportion of blacks among registered Democrats was even lower - 30.5%.[195] Over the years, the proportion of blacks who were registered slowly increased and the proportion of whites who were Democrats slowly declined, but the largest jump before 1992 took place in 1984, especially in the Second District. During Michaux's campaign, only an estimated 32.9% of the Democrats in the Second District were black; during Spaulding's, 40.6%.

The major effort that went into registering 13,000 new black voters moved Spaulding only 1.7% closer to Valentine than Michaux had been. With no third candidate in the contest, Valentine's 52.1% to 47.9% victory was enough to guarantee his nomination and easy election in November. The first sentence of the *News and Observer*'s election story emphasized racial bloc voting: "U.S. Rep. I.T. 'Tim' Valentine, in voting that generally followed racial lines, turned back a strong challenge from state Rep. Kenneth B. Spaulding . . ." Again, Engstrom's statistical analysis confirms observers' reports. He estimates that Spaulding received 89.7% of the black vote and 14.1% of the white, percentages that are nearly identical to Michaux's two years earlier. As a Raleigh business lobbyist, V.B. "Hawk" Johnson, summed it up, "That's the story, there are still more whites than blacks."[196]

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[194]A.L. May, "Increase in black voters makes primary a tussle for Spaulding, Valentine," *RN*, Mar. 19, 1984; Elizabeth Leland, "New black voters in 2nd District outnumber whites nearly 2-to-1," *RN*, April 18, 1984; Ginny Carroll, "Cobey outspends Democrat opponents 2-1," *RN*, April 21, 1984; Daniel C. Hoover, "Mix of racial support sought," *RN*, May 6, 1984.

[195]Although it keeps some records of registration cross-classified by both race and party, the state of North Carolina does not make them available for all counties. My estimates are based on the figures for 53 North Carolina counties in 1993, supplied as part of the supplementation to Thomas Hofeller's deposition in *Shaw* v. *Hunt*. In these counties, the proportion of black registrants who were Democrats was 94%. Other, scattered mentions of the party affiliation of blacks in the newspapers are very similar. To arrive at the partisan percentages in the text, I simply multiplied the total black registration in each district by 0.94 and divided the result by the number of Democrats.

[196]Daniel C. Hoover,"Valentine holds off Spaulding in tight 2nd District race," *RN*, May 10, 1984; Defendant-Intervenor's Exhibit 13, Table 1, *Shaw* v. *Hunt*. In a much less heated contest for the Democratic nomination in the Fourth Congressional District, incumbent Ike Andrews held off Howard Lee and John Winters, a minor black candidate, in the first primary. Lee raised only $8195, compared to Andrews's $24,042, Spaulding's $72,585, and Valentine's $188,781. Ginny Carroll, "Cobey outspends Democrat opponents 2-1," *RN*, April 21, 1984. Engstrom estimates that Lee received 24.3% of the white vote in the nearly invisible contest. My textual discussion reflects the focus of the media and the voters, as indicated by their increased registration and turnout, on the Spaulding-Valentine race.

With considerable foresight, *News and Observer* reporter Daniel C. Hoover predicted as soon as the 1984 primary results became known that "The latest victory could serve to deter future black opponents, leaving Valentine generally secure from serious primary challenges." Announcing that he would not challenge Valentine in 1986, Michaux echoed Hoover, saying that "many black voters have lost their enthusiasm for another primary challenge against Valentine after having worked hard in losing causes in 1982 and 1984."[197] Valentine had no primary opponents from 1986 through 1992.

8. THE RECORD ON THE EVE OF THE REAPPORTIONMENT OF THE 1990S

If members of the North Carolina legislature in 1991 had contemplated drawing districts that were essentially similar in their racial composition to those of the 1980s, they could not have expected to prevail if an intent case were filed against them under Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments.[198] The discriminatory racial and partisan concerns that so notoriously underlay the formation of the "Black Second;" the well-known history of other discriminatory electoral devices such as the poll tax, the literacy test, at-large voting for the state legislature, and the anti-single shot law; the immediate historical context to the 1981 redistricting;[199] the lines of the 1981 redistricting, particularly the fishhook, and the diminution of the black percentage in the Second District, which was noted both on the floor of the legislature and by the Justice Department in its Section 5 objection letter; the widely noted failure of black political candidates for Congress in the

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[197]Hoover, "Valentine holds off Spaulding in tight 2nd District race," *RN*, May 10, 1984; "Under the dome -- Valentine may skate through primary," *RN*, Dec. 27, 1985.

[198]In his dissent in *Shaw* v. *Hunt*, *supra*, n. X, at 482, Judge Vorhees rejected the contention that blacks could have won a Section 2 *effects* case because, in his view, they could not prove the second part of the "first *Gingles* prong" -- that they were geographically compact enough to form a majority of a congressional district. Whatever the validity of Vorhees's informal eyeball standard of compactness, it is irrelevant to a hypothetical challenge on the basis of intent, which Vorhees conveniently ignored even though it was repeatedly and explicitly raised as a possibility in various papers that the defendant side submitted to his court.

My analysis here is patterned on the nine "intent factors" that I identified in my testimony in the *Garza* case (discussed more fully in "How to Determine Intent," *supra*, n. xxx). The proof of intent in *Garza* involved much more than quick glances at maps, and, unlike whites in North Carolina, Latinos in Los Angeles were clearly injured. They had not been able to elect a Latino supervisor since 1874.

[199]Howard Lee's surprising showings in the 1972 congressional and 1976 Lieutenant Governor's primaries suggested that a better funded black candidate might be a threat, especially if Durham were added to the Second District. In 1981, Michaux had all but declared for Congress when the legislature was considering redistricting. See "Michaux is likely candidate," *RT*, July 21, 1980; Beverly Shepard, "Michaux may run for public office," *RN*, July 21, 1980.

state since 1900;[200] the universally understood pattern of racial bloc voting in election campaigns; the actions of the legislature on other racial issues, such as the continuation of at-large elections for the state legislature in 1981, in the face of charges of racial discrimination; and the deviation in 1981 from the traditional state policy of not splitting counties, which was not forced by population equality concerns, but by the desire to preserve L.H. Fountain from challenge by a candidate of the black community -- all these factors would have established an overwhelming case of racially discriminatory intent. North Carolina spent half of the 1980s in an unsuccessful effort to stave off racial change in the state legislature.[201] The almost certain prospect of losing another such case gave the State a clear and compelling interest in remedying past discrimination[202] by drawing a district in which African-Americans would have a fair opportunity to elect a candidate of their choice.[203]

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[200]Untitled article, *RN*, Jan. 12, 1972 quoted Congressman George White's farewell address in 1901 as the last southern black (until 1973) to serve in Congress.

[201]See *Thornburg* v. *Gingles*, *supra* n. XXX.

[202]In his dissent in *Shaw* v. *Hunt*, *supra*, n. X, at 488, Judge Vorhees asserts that Phillips and Britt found that "the State has failed to demonstrate any basis in evidence for a conclusion that such remedial action was necessary." What they in fact found was that the number of North Carolina legislators who acted purely from a motive of remedying past discrimination did not constitute a majority of both houses. Id., at 141, finding 3. The majority's rather casually drawn conclusion would perhaps have been more difficult for Judge Vorhees to misstate if their opinion had discussed the evidence for that conclusion in more detail. This paper supplies that missing discussion. Moreover, since in any legislative body, most issues are decided by coalitions of legislators, the intentions of any large or important subgroups are hardly irrelevant to the final outcome of a bill. Thus, the motives of African-American and liberal white legislators, many of whom no doubt sincerely wished to redress past discrimination in redistricting, are quite pertinent to determining whether such redress constituted a compelling state interest.

[203]The repeated efforts by highly qualified black candidates in the Second Congressional District served, in effect, as experiments about the conditions under which black candidates could be elected to Congress in North Carolina. Clayton's and Lee's campaigns against Fountain in 1968 and 1972 proved that blacks could not beat an entrenched incumbent; Michaux's against Valentine in 1982, that they could not win an open seat; Spaulding's, in 1984, that they could not win with the aid of a massive registration effort, even if the candidate were running at the same time as a primary campaign by the first serious African-American candidate for President in history. After 1984, it was clear that blacks needed more, probably considerably more than 40% of the population in a congressional district in North Carolina to be able to elect a candidate who was their first choice.

C. REDISTRICTING IN THE 1990S: A PARTISAN CIRCUS

1. A CHANGED CONTEXT

Legally and politically, the context for redistricting in North Carolina in 1991 differed a great deal from that of 1981. Nationally, the 1982 amendment to Section 2 of the Voting Rights Act, as elaborated in the Supreme Court's decision in *Gingles*, had been interpreted to mandate the drawing of majority-minority districts wherever possible, but the definition of "possible" was vague and unsettled.[204] Furthermore, the Supreme Court in *Rogers* v. *Lodge* and lower federal courts in such cases as the remand decision in *Bolden*[205] and the mixed motive case of *Garza*[206] had shown that it was possible to prove a racially discriminatory purpose to the satisfaction of many judges. Even before the 1990 elections, then House Speaker Josephus L. Mavretic, D-Edgecombe, warned his colleagues of the likelihood of legal challenges to the upcoming redistricting, including suits under the Voting Rights Act, and indicated his desire to avoid them if possible.[207] In part no doubt to circumvent such litigation, the House Redistricting Committee hired Leslie Winner, the *Gingles* lawyer, as its consultant. Along with her brother, State Senator Dennis Winner, D-Asheville, Chair of the Senate Redistricting Committee, Leslie Winner would be inside the tent this time.[208]

Not only had the *Gingles* litigation cost the state money and pride, it had also added to the number of African-American and Republican legislators, as at-large systems in several counties gave way to single-member districts. In 1981, only 20% of the legislators were Republicans; whereas, in 1991, 31% were -- 14 of the 50 state senators and 39 of the 120 members of the House. While in 1981, there had been only 4 blacks in the legislature, by 1991, there were 19, a full 11% or half of their

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[204]Congressional Quarterly, *CQ's Guide to 1990 Congressional Redistricting*, Part 2 (Washington, D.C.: Congressional Quarterly, Inc., 1993), xiii.

[205]*City of Mobile* v. *Bolden*, 542 F.Supp. 1050 (S.D. Ala. 1982).

[206]*Garza* v. *Los Angeles County Board of Supervisors*, 756 F.Supp. 1298 (C.D. Cal. 1990), aff'd 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 681 (1991).

[207]"Under the Dome -- Mavretic maps '91 redistricting," *RN*, Oct. 14, 1990, p. C1.

[208]"Under the Dome -- Legislature's legal bills near $60,000," *RN*, Jan. 8, 1992, p. B1; Van Denton, "House, Senate district plans advance -- Partisan splits mark debates on proposals," *RN*, Jan. 14, 1992, p. A1.

proportion in the state's population -- larger, but much too small to dictate to anyone.[209] It was true that blacks occupied important leadership positions in the legislature, as Dan Blue ascended to the Speakership in that year and Milton F. "Toby" Fitch became one of three co-chairs of the House Redistricting Committee. But with power went partisan responsibility, as Blue, Fitch, and the others owed their positions to the support of a predominantly white party, with the good fortune of which their own fortunes were inextricably intertwined. Moreover, any aspirations that they had for higher office were subject to the will of an electorate that was three-quarters white. Their positions eliminated any possible use of the "balance of power" strategy that members of minority groups have often been urged to employ, particularly, in the recent past, in redistricting. As people who shared power in the Democratic party, they could not make deals with Republicans or use the threat of doing so to pressure white Democrats for more black seats.[210] Thus, until the Justice Department's refusal to preclear their first plan, Speaker Blue and the other black legislators firmly supported a proposal to create only one black-majority congressional seat out of twelve.

2. PARTISAN WARFARE

From the beginning to the end of the 1990s cycle of redistricting in North Carolina -- indeed, continuing in the *Shaw* v. *Hunt* suit -- the partisan strife was bitter and brutal. At one of the first meetings of the House Redistricting Committee, Republican members proposed a guideline that "would prohibit the drawing of new districts that would dilute the voting strength of political parties or that are designed to protect incumbent legislators" -- a rule so obviously impossible to achieve that its suggestion could only have been meant to embarrass the majority party.[211] Every plan produced on the legislature's computer instantaneously linked partisan registration data, as well as returns from three recent statewide elections, to population and racial percentages for each district, giving unmistakable cues to all participants and observers about the partisan and racial consequences of any plan or changes in it. Newspaper articles pointed out that the first Democratic proposal decreased Republican percentages in four districts, possibly endangering one or two Republican incumbents and

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[209]In her majority opinion in the *Croson* case, *supra* n. XXX, at 723, Justice O'Connor stressed that the majority of the Richmond City Council was African-American.

[210]Van Denton, "Party loyalty, black gains clash in redistricting," *RN*, Jan. 7, 1992.

[211]Van Denton, "Parties squabble over redistricting -- Panel can't agree on ground rules," *RN*, May 2, 1991, p. B3.

strengthening Democrat David Price in the Fourth District.[212] When the plan was made fully public, the *News and Observer* summarized the purposes of its authors as "to simultaneously equalize district populations, turn 11 districts into 12, protect incumbent Democrats, inflict maximum carnage on most incumbent Republicans and construct one district with a black majority."[213]

Republicans retaliated by playing the race card in a manner different from the famous Jesse Helms "white hands" television commercial of 1990.[214] State House member David Balmer proposed a plan with two districts that, he contended, contained a majority of minorities, not in an effort to convince his colleagues to adopt it, but in an attempt to get courts to intervene. As he said on the floor of the House when he offered it, "We would hope that if it is possible to draw two congressional districts with high minority percentages that the federal courts would come in and encourage the North Carolina legislature to draw two minority congressional districts. This district simply shows that it can be done." Even before the legislature officially adopted a plan, the state's four Republican congressmen sent a letter to Asst. Attorney General for Civil Rights John Dunne asking the Department to intervene in the process on the grounds that the legislature had not adopted the Balmer plan. A skeptical Mickey Michaux, now returned to the legislature, remarked "I ain't never known no Republican trying to help anybody black," while African-American State Senator Frank W. Ballance, Jr., D-Warren, commented that "When people who have been kicking me all over town propose a plan, it raises questions."[215]

3. COMMUNITIES OF INTEREST AND POWER

The rise in the number of Republicans in the legislature and the expectations of African-Americans that the amended Voting Rights Act and the increased power of black legislators would make black voices more audible than in 1981 simplified and structured the redistricting process. No longer would intraparty strife such as that between L.H. Fountain and five more moderate Democratic congressmen determine the agenda and endlessly deadlock the legislature. Democrats could afford few defections,

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[212]Van Denton, "GOP, black congressional districts proposed -- Redistricting plan to be presented to panels today," *RN*, May 29, 1991, p. B1.

[213]Editorial, "A map to boggle minds," *RN*, June 1, 1991, p. A12.

[214]The notorious spot pictured the hands of a white male tearing up a letter rejecting him for a job for which he allegedly was qualified, but which he lost because the job had to be given to an anonymous and dehumanized "minority."

[215]Van Denton, "Redistricting plan defended, derided," *RN*, May 30, 1991, p.B1; Denton, "GOP congressmen blast Democrats' redistricting plan," *RN*, June 14, 1991, p. B3; "Under the dome -- Black legislators cool to district idea," *RN*, June 19, 1991, p. B1.

because the Republicans might take advantage of them to force through one of their own plans. Just as important, it was no longer possible to insist on preserving county, city, town, township, or even precinct boundaries, because the absolute population equality interpretation of *Karcher* v. *Daggett* required that all of these give way.[216] This development gave more power to the technicians who had to fix up every plan in order to reduce population deviations to nearly zero, and it prevented people from adamantly refusing to transfer a well-recognized entity, a whole county, from one district to another. Taken together, these two developments removed the focus of redistricting from geography and local attachments and put it instead on partisan politics and social groups that transcended localities. In this sense, 1991-92 was the first "modern" redistricting in the history of North Carolina.

A process run by lawyers seeking to avoid legal missteps or obvious bias, the redistricting effort of 1991 was comparatively short and predictable. There were public hearings at which everyone could speak and where perhaps the most notable calls were those from black citizens and representatives of the NAACP and ACLU for more seats for minorities, including one or two in Congress. Computers with efficient redistricting software were made available to all members, along with training on how to use them.[217] Both Republicans and African-Americans were well represented on the redistricting committees and at the hearings. Plans were developed quickly and offered for public discussion. Within a few weeks of its public unveiling, "Congressional Base Plan #1" or "CB1" for short, had evolved into CB6 and been passed by both houses of the legislature, which rejected proposals by Republican Representatives David Balmer of Charlotte and Larry T. Justus of Hendersonville. Balmer's 6.2 plan, which contained one black majority district and another approximately equally divided between blacks and whites of voting age, with Lumbee Indians holding the balance of power, attracted the most attention of any of the non-Democratic plans. On the day the House took its final vote, Balmer introduced another plan, known as Balmer 8.1, which did not rely on black-Indian cohesion for a majority, but the legislature never fully considered this proposal. CB6, passed as Chapter 601 of the 1991 Session Laws, contained a single black majority district in the northeast rural and small-town section of the state, but stretching into the city of Durham.[218]

The addition of a twelfth congressional seat and the announcement of the retirement of the 77-year-old Walter Jones of the First District allowed CB6 to fulfill two goals without inconveniencing

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[216]Joint Senate and House Committees on Congressional Redistricting, "Redistricting Criteria For Congressional Seats," April 17, 1991, Plaintiff's Exhibit 14, *Shaw* v. *Hunt*.

[217]Gerry F. Cohen deposition, Nov. 12, 1993, at 45-57, *Shaw* v. *Hunt*.

[218]Van Denton, "Congressional district plan advances in House," *RN*, June 26, 1991, p. B3; Denton, "Remap takes odd twists -- redistricting aids blacks, incumbents," *RN*, June 27, 1991; Denton, "New congressional districts enacted -- Plan still faces legal hurdles," *RN*, July 9, 1991, p. B3; Denton, "ACLU asks government to reject state redistricting," *RN*, Sept. 28, 1991, p. B4.

any Democratic incumbents. Territory from the current First and Second Districts could be joined to create a district with a small majority of African-Americans, 51.3%, in the voting age population. Legislative opinion reflected the widely-shared belief among voting rights lawyers that states and localities that could create majority-minority districts had the legal responsibility to do so, and that the indicator of such a district in the minds of judges was the presence of a voting-age population majority.[219] The new district, which could be conceded to the Republicans and located in the Piedmont, could be made useful to the Democrats if it absorbed troublesome Republicans from marginally Democratic districts in the area. The only district with a majority of registered Republicans in the state, the CB6 Twelfth was in fact a landslide Republican district, since Republican percentages typically ran 15-30% ahead of the party's registration in congressional contests.

When the Department of Justice on December 18 rejected the state's congressional plan and suggested the possibility of drawing a second majority-minority district in the southeast, seeming to hint at Balmer's Charlotte-to-Wilmington formulation that gutted the districts of Charles Rose and Bill Hefner, the Democrats' first reaction was, as Speaker Blue put it, that "The entire thing is political." This was not reduced when Republican State Chairman R. Jack Hawke Jr. boasted that any new plan would give Republicans a majority of the congressional delegation.[220] Within a week, five Democratic congressmen urged Blue and the state to file a Section 5 case in Washington. But before the end of the year a Rose aide, John Merritt, was in Raleigh shopping a new plan that he hoped would avoid both court and a party debacle, particularly for his boss. Starting from the Republican "Balmer 8.1," the scheme had been modified by a legislative staff member at the request of Rep. Thomas C. Hardaway, a black Democrat from Halifax county, to make it less favorable to the GOP. Hardaway brought what was now called "Optimum II-Zero" to Merritt's attention in Washington, and Merritt immediately took the concept to the nearby office of the National Committee for an Effective Congress, a liberal political action group with a well-known competence in the technical aspects of redistricting and politics, where a complete map was drawn over a weekend with the help of people from the staffs of other Democratic congressmen. Merritt, who had good contacts in the legislature, then took 30 copies of the plan to Raleigh, where he met with Leslie Winner and Gerry Cohen, as well as a number of legislators. He also talked in person and by phone with state and national leaders of the NAACP in an ultimately successful effort to interest them in the plan. On Jan. 8, ten days after

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[219]Cohen deposition, at 75-77, *Shaw* v. *Hunt*.

[220]Van Denton, "GOP teamed up for victory -- Redistricting ruling debated," *RN*, Dec. 20, 1991, p. A1; Denton, "House, Senate leaders produce similar redistricting proposals," *RN*, Jan. 20, 1992, p. A1.

Merritt had come to Raleigh, Mary Peeler of the NAACP presented something very close to Merritt's plan at a legislative hearing.[221]

Reaction to the new plan was often harsh. Utterly forgetting the state's long history of racial and partisan gerrymandering, discrimination, and disfranchisement, the *News and Observer* denounced every congressional plan that contained a majority black district as based on a "profoundly un-American principle" that will "radically change our system of government." Republican Chairman Hawke more simply charged the Democrats with "trying to get rid of Republicans and protect Democratic incumbents."[222] Although some Democrats referred to the proposed Twelfth as "the urban black district," one that would have "a strong urban agenda," the media seemed to favor a new plan proposed by the League of Women Voters.[223] The LWV plan's districts looked compact on a map, but would almost certainly not have had a large enough black population to elect a black candidate. The LWV northeastern district had approximately a 45% black population, and no doubt a smaller proportion of the voting age population and registered voters. The Michaux and Spaulding contests proved that racial bloc voting was too strong to elect a black candidate in such a district.[224] The LWV southeastern district, with a combined black and Indian population of 43.7%, was even farther from offering minorities an opportunity to elect candidates of their choice. Moreover, State President Claudia Kadis's comments in a newspaper column pushing the LWV plan make clear how far fair representation for African-Americans was from her organization's concerns. The proposed First District, she sneered, "consists mainly of rural areas with little in common but minority populations and poverty." Such groupings did not amount to "communities of interest," deserving of representation, in her view. In fact, the only examples of communities of interests that she gave were "television markets, newspaper delivery areas, highway and rail networks, [and] chambers of

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[221]Ferrel Guillory and Van Denton, "Assembly urged to fight -- Democrats want state in court over districts," *RN*, Dec. 31, 1991, p. A1; Guillory, "GOP seeks change in district map -- Congressmen want no action in court," *RN*, Jan. 9, 1992, p. B1; Denton, "2 black districts urged -- Proposal favors N.C. Democrats," *RN*, Jan. 10, 1992, p. A1; Gerry F. Cohen deposition, *Shaw* v. *Hunt*, Nov. 12, 15, 1993 (herein after "Cohen depo."), pp. 264-65; Merritt deposition, Dec. 22, 1993, *Shaw* v. *Hunt* (hereinafter "Merritt depo."), pp. 21-34.

[222]Editorial, "I-85 no route to Congress," *RN*, Jan. 13, 1992, p. A8; Van Denton, "Plan could cost GOP -- New seat would be Democratic," *RN*, Jan. 17, 1992, p. B1.

[223]Van Denton, "House Democrats offer districting plan -- Map similar to congressional proposal," *RN*, Jan. 19, 1992, p. A1; "Under the Dome: Gantt ally eyeing U.S. House seat," *RN*, Jan. 21, 1992, p. B1.

[224]Although the LVW claimed that 40% would be sufficient, because the majority-vote requirement had been relaxed to allow a winner to be declared if she got 40% or more of the vote, the organization ignored the fact that 50% was still required in a two-person contest like the Valentine-Spaulding race. The LVW proposal was also quite technically flawed, lacking contiguity in some areas, failing to assign others to any district at all, and consequently not properly balancing the census population figures. Cohen depo., 270-76.

commerce."[225] When it endorsed the LWV proposal while denouncing the legislators for being "driven by a wrongheaded determination to protect incumbent Democratic congressmen," the *News and Observer* did not go so far as to argue that the LWV plan gave blacks a fair opportunity, only that it "improves blacks' victory chances."[226]

There were two motives behind the relatively minor, but numerous changes in the Merritt/Peeler plan before it was adopted as CB 10 (or "Chapter 7", in the official parlance of state law): one was to make District 12 more consistently urban, and, therefore, more of a homogeneous community of interest, and the other was to accommodate various political and idiosyncratic wishes of influential politicians. As Gerry Cohen, the legislative technician who actually performed the changes noted, parts of two cities, Winston-Salem and Gastonia, were added to District 12, and rural parts of four counties were deleted in a successful attempt to raise the proportion of the population in that district who lived in places of greater than 20,000 from 60% to 80%.[227] Politically, modifications were made in District 1 aimed, Cohen said, at "improving the chances of incumbent congressmen in the Second, Third and Eighth Districts to be elected." John Merritt simply sent Cohen faxes of precincts to be moved. In the Piedmont, Cohen recieved a similar list from a staffer of Congressman Steve Neal, and he moved Republican Randolph County from the Fourth to the Sixth District in an effort to benefit both Fourth District Democrat David Price and Sixth District Republican Howard Coble. Other alterations improved the reelection chances of Eleventh District Republican Charles Taylor, moved the home of Rep. Walter Jones, Jr., who wished to succeed his father in Congress, into the new First District, and shifted lines marginally to put staff aides or campaign managers of various members of Congress in their bosses' districts.[228] The legislature adopted the plan on a largely party-line vote. Before the vote, Sen. Frank W. Ballance, Jr., endorsed CB10 as a "remedial piece of legislation. There may come a time when we can come back here and do away with these black districts and elect people based on their qualifications."[229] But the time, as the history of black attempts to elect candidates of their choice to Congress in the 1980s proved, had not yet arrived.

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[225]Kadis, "Let sound principles shape new districts," *RN*, Jan. 23, 1992, p. A15.

[226]Editorial, "Rule, redistrict and ruin," *RN*, Jan. 24, 1992, p. A16.

[227]Cohen depo., 177-84, 215.

[228]Ibid., 171, 211-24, 230, 240.

[229]Van Denton, "House OKs new districts -- Congressional plan has two black seats," *RN*, Jan. 24, 1992, p. B3; Denton, "Senate enacts new district plan -- Vote tracks party lines," *RN*, Jan. 25, 1992, p. A1.

4. A PARTISAN SCORECARD

Despite the fact that participants in the North Carolina reapportionment of 1991-92 were more open about discussing the partisan aspects of their handiwork than is often the case in redistricting episodes, they did disagree publicly about the effects of the very numerous proposed plans. To make sense of the process, it is useful to have a standardized and objective means of assessing their partisan effects. Although predicting future elections is a somewhat inexact process because voters may shift their behavior, economic and other socioeconomic conditions may change, and different candidates may run for office, it is possible to make fairly precise estimates based on patterns from the immediate past for the offices at issue. In a paper based on an analysis of congressional and state House elections in California from 1970 through 1992, I showed that a very simple statistical technique can account for about 90% of the outcomes in those elections.[230]

Essentially, one performs an "ordinary least squares regression" of the percentage of the total vote for each party on the percentage of the total number of voters who are registered with each of the major parties, or with some other index of core partisan voting strength. The resulting estimates can be used for two purposes: First, by multiplying the registration proportions in each district by the coefficients from the regression equations, determining the victor in each district in this hypothetical election, and then comparing the hypothetical with the actual results, one can test how well the model predicts winners and losers. Second, once the method is validated, it can be applied to plans that were not put into effect to determine the likely outcomes if they had been adopted. The advantage of using data based on congressional elections to predict the results of future congressional elections ought to be plain: There may well be different dynamics operating in elections for different offices. Naturally, as with any other index, there are problems with this one, the most important being that it assumes that voters from each party defect to the other party at the same rate throughout the state. It does, however, give outsiders a sense of the political consequences that insiders know of, but seldom discuss in public in full candor.

Table 2 presents the equations for North Carolina congressional elections from 1980 through 1992. The R^2's for the equations, or percentages of the variances in the voting percentages explained by the registration percentages, are quite respectable, although not very many of the individual coefficients are statistically significant at conventional levels. Graphs not shown here indicate no striking nonlinearities in the relationships. Table 3 shows how well the equations do at predicting winners for each party. The row for 1980, for example, shows that the separate equations for Democrats and Republicans for that year correctly predicted 8 of the 11 outcomes. Democrats won one seat that statewide trends predicted that they would lose, while Republicans won two seats that statewide trends suggested that they would lose. In general, the equations predict about 80% of the contests correctly, generally missing only in the marginal contests concentrated in the Fifth, Sixth, and Eleventh Districts.

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[230]"Estimating the Partisan Consequences of Redistricting Plans -- Simply," (mimeo., California Institute of Technology, Jan., 1994, revised July, 1994).

In 1992, the equations called 11 of the 12 contests correctly, slightly underestimating Democratic strength in the Fifth District in a very good year for the Democrats.

(Tables 2 and 3 about here)

Table 4 applies the same technique used in Table 3 to nineteen plans that were never put into effect and the one that was, CB10. In order to indicate what legislators, members of Congress, and their staffs expected the partisan effects of their plans to be, predictions from equations relating to the two immediately succeeding elections, one a presidential year and one an off-year, are included. The last column suggests what might have happened under the conditions of the 1992 election.

(Table 4 about here)

The most obvious point that the table makes is that the partisan effects of a plan are easy to predict, once one knows the party of the person or persons who drew it. The nine Republican plans, including the first one Republican consultant Tom Hofeller drew for *Shaw* v. *Hunt*, almost uniformly split the congressional delegation in half no matter which party is favored by overall trends in a particular election year. In fact, the vast majority of the districts in the Republican plans were, by this measure, uncompetitive. If the Flaherty Plan had been in place in 1992, for instance, the smallest predicted margin of victory in any district would have been 6.5%. Under the same conditions, only three of the races in Hofeller's proposed districts would have been closer than 10%, with the closest of them a 4.7% victory for a Republican. By contrast, all of the Democratic plans were estimated to produce from seven to nine Democrats in the twelve-person delegation, and more of the contests would be expected to be somewhat closer. Had CB9 been adopted in 1992, for instance, the estimate is that two of the races would have been decided by less than 4%. Looking at the table and imagining that the Democrats projected the most recent patterns, those from 1990, into the future, it is easy to see why they were dismayed when the Department of Justice rejected CB6, why Republicans, who hoped that the action of the Department would force the legislature to adopt one of their plans, were jubilant, and why Democrats welcomed the proposal worked out by Merritt and presented to the legislature by Mary Peeler. This table suggests more graphically than any district map possibly could why the Democratic majority in the legislature chose to respond to the Justice Department's call to establish two majority-minority districts by adopting CB10, instead of one of the Republican alternatives: On the basis of the best information available at the time, the stakes were two Democratic members of Congress.[231]

[231]For a precisely similar estimate by Republican State Chairman R. Jack Hawke, Jr., see Van Denton, "GOP teamed up for victory -- Redistricting ruling debated," *RN*, Dec. 20, 1991.

5. INTENTION IN 1991-92

A close reading of the activities of legislators in North Carolina in 1991-92 shows that they adopted the districts they did for many reasons: First, to satisfy an extremely precise definition of the equal population standard that legislators believed was implied by *Karcher* v. *Daggett* and other cases. If the solons had believed that districts only had to be within five percent of the ideal population size, as they believed was the standard for state legislatures, they could have drawn much more compact districts with political effects similar to those that they drew. Second, to satisfy the standards of the Voting Rights Act, as interpreted by the Department of Justice. Third, to protect Democratic incumbents and more generally, the interests of the Democratic party. As Gerry Cohen commented during the *Shaw* v. *Hunt* trial, "All lines drawn in this case were politically driven."[232] Or as the Co-Chair of the Redistricting Committee, Toby Fitch, put it, "Politics" is "what . . . redistricting is all about."[233] Fourth, to make it possible for African Americans, for the first time this century, to elect one or two candidates of their choice to Congress from the state, an action that remedied nine decades of discrimination. Fifth, to avoid the litigation that the legislators knew would certainly otherwise ensue, litigation similar to that which had embroiled the state in a half-decade of turmoil, expense, and embarrassment during the 1980s.[234] Sixth, in the case of what became the Twelfth District, to construct an urban district that would share similar problems and proclivities and would be relatively easy to traverse. In sum, just as in 1981, the motives of the legislature were mixed.

There is no question, and, indeed, the state openly acknowledged that the First and Twelfth Districts were drawn with a consciousness of race. But a desire to comply with federal court decisions and those of the Justice Department in a manner that obviously does not disadvantage protected minorities can hardly be seen to have a racially discriminatory intent, although it obviously does take race into account. As I have argued above, taking race into account for remediation and compliance is compatible with Justice O'Connor's *Shaw* opinion, and it is the central holding of the majority in *Shaw* v. *Hunt*. If the shape or placement of districts is of particular importance, then the principal question is why the legislature chose to draw the First, and particularly the Twelfth, as it did, and not elsewhere or in a manner that some might consider more aesthetically pleasing. And the answer, as

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[232]Editorial, "Redistricting's soft underbelly is exposed," *Greensboro News and Record*, March 30, 1994.

[233]Dennis Patterson, "Lawmaker says ugly districts serve a purpose," *RN*, April 1, 1994, p. 3A, c.2.

[234]In his deposition, pp. 254-55, Gerry Cohen says that during committee meetings on redistricting, he heard three reasons for drawing majority/minority districts in North Carolina in 1991-92: "One was that the Voting Rights Act required it; second, that it was the right thing to do. The third was that districts had been deliberately drawn in the 1980 plan so as to reduce the ability of minorities to be elected, and that the legislature -- and had been so since the turn of the century -- and that the legislature in response to a past pattern of discrimination had some duty to remedy this wrong."

Table 4, comments at the time, John Merritt's deposition, the Republican suit in *Pope* v. *Blue*,[235] and a good deal of comment in journals and news articles all agree, is partisanship and incumbent protection. If the legislature could have drawn the Twelfth District in other ways that would have made it possible for blacks to elect a candidate of choice, and it chose this way because the I-85 district hurt no Democrats, then the decision to draw the "ugly" Twelfth District could not logically have been taken for racial reasons at all.

V. PARTISANSHIP, IDEOLOGY, AND RACE IN THE REDISTRICTING OF TEXAS, 1971-1991

A. TEXAS -- THE BIGGEST POLITICAL THICKET

Although in size and demographic variety, Texas would appear much more complex than North Carolina, the Lone Star State's incomparably brutal politics[236] reduced the history of recent redistricting there to the same simple factors that accounted for the outcomes in the Tarheel State: partisanship, incumbent protection, ideology, and race. Two and a half times as large in population as North Carolina in 1990, Texas was also much more urban. In fact, the two consolidated metropolitan statistical areas of Dallas/Fort Worth and Houston/Galveston by themselves contained 17% more people than the entire state of North Carolina in 1990. While North Carolina's one substantial ethnic minority, African Americans, accounted for 22% of its population, Texas had *two* major ethnic minorities -- Latinos constituted 26% of the population and blacks 12%.[237] Since blacks were predominantly concentrated in Houston and the Dallas/Fort Worth "Metroplex," it was easy, in principle, to draw congressional and state legislative districts that urban black voters could control while keeping districts within the same metropolitan areas. The rural Latino population in South Texas was so overwhelming in numbers that it required considerable craftsmanship *not* to draw several rural Latino congressional districts. In Houston, however, the high proportion of non-citizens among Hispanics, the dispersion of the population in the unzoned city, and the fact that Hispanics and African-Americans lived interspersed with each other made it difficult to establish congressional districts that gave both fair opportunities to elect candidates of choice.

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[235]*Supra*, n. XX.

[236]The best introduction to recent Texas politics is Chandler Davidson, *Race and Class in Texas Politics* (Princeton, N.J.: Princeton Univ. Press, 1990).

[237]Statistics computed from figures in U.S. Department of Commerce, *Statistical Abstract of the United States, 1993* (Washington, D.C.: GPO, 1993), Tables 31, 32, 42. Native Americans accounted for one percent of the population of North Carolina and much less than one percent of that of Texas.

B. REDISTRICTING IN TEXAS BEFORE 1971

Prior to the U.S. Supreme Court's 1962 decision in *Baker* v. *Carr*, rural conservatives in the state maintained power by denying urban areas anything close to the representation that their population proportion merited, and even by refusing to reapportion altogether. There was no reapportionment of the state legislature from 1921 until 1951, and no congressional reapportionment between 1933 and 1957. Since 1962, the state has been in court almost continuously over issues of population equality, multimember districts, charges of partisan gerrymandering and anti-minority racial discrimination, and in the 1990s, compactness and allegations of discrimination against Anglos.[238] In 1966, for example, the redistricting of the state House of Representatives was challenged on the grounds not only of unequal population, but also, according to a standard account, because of "the political and racial gerrymandering that was evident in the new plan, the disenfranchisement of Negroes, and the overall crazy-quilt irrationality of the apportionment."[239] Since courts plunged into the political thicket, more headlong in Texas, perhaps, than in any other state, the normal pressures of political compromise have been relaxed (because no agreement is final until every court says it is) and each line has been drawn with attention to what might attract the critical eye of a judge. Until recently, lawsuits have protected the rights of discrete and insular ethnic and racial minorities much more than they would have been protected in the normal political process. In the legislature during the 1960s and 70s, for instance, "Proposals by minorities to shape districts to their liking were generally rejected in redistricting committees or after floor challenges to committee reports."[240] Before the 1991 legislative session, it was only the courts that moved Texas minorities toward equal access to the political process. After 1991, it was the courts -- Judge James Nowlin's court for the State Senate and Judge Edith Jones's court for Congress -- who moved Texas minorities *away* from equal access to the political process.[241]

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[238]A good overview is Steve Bickerstaff, "State Legislative and Congressional Reapportionment in Texas: A Historical Perspective," *Public Affairs Comment*, 37, #2 (Winter, 1991) (LBJ School, UT Austin).

[239]Ronald G. Claunch, Wesley S. Chumlea, and James G. Dickson, Jr., "Texas," in Leroy Hardy, Alan Heslop, and Stuart Anderson, Eds., *Reapportionment Politics: The History of Redistricting in the 50 States* (Beverly Hills: Sage, 1981), 311-16.

[240]*Ibid.*

[241]*Terrazas* v. *Slagle*, *supra*, n. XXX; *Vera* v. *Richards*, *supra*, n. XXX.

C. THE 1970S: CONTROVERSY, CORRUPTION, AND COURT-ORDERED REFORM

1. 1971: Mutscher's Melodrama

The 1971 redistricting in Texas was like a Renaissance melodrama -- deeply flawed and Machiavellian leading characters, complicated and noisy intrigues, and a sanguinary finale. As at Elizabethan plays, the poorer sort were largely confined to being spectators in the "pit" -- and the real players worked hard to continue the separation. Although African-Americans, Latinos, Republicans, and liberal Anglos in the state had long contended that multimember state House districts discriminated against them, and although the U.S. Supreme Court mandated single-member districts for Mississippi in the midst of the Texas legislature's consideration of its own plans, the conservative Lone Star body adamantly refused to abolish multimember plans in the large urban counties.[242] The state Senate plan substituted conservative for liberal whites in the only district that had elected an African-American in this century, insuring retrogression in minority representation in the upper house.[243] Abjuring elaborate pretense about committee hearings or open consideration of alternatives, House Speaker Gus Mutscher (caught up already in the Sharpstown Bank scandal), Lt. Gov. Ben Barnes (soon to be tainted by a loan from the same bank), and a few of their allies drew the lines.[244] Besides disadvantaging African-Americans and Hispanics, the plans were also designed to punish Mutscher's critics, a vociferous, but outvoted coalition of twenty liberal Democrats and the 150-member House's ten Republicans known as the "Dirty Thirty."[245] On the regular session's last day, a raucous gallery cheered as one of the House's two blacks, "Dirty Thirty" leader Curtis Graves of Houston, blasted Mutscher. At least fourteen of the thirty, including the only announced challenger to Mutscher's Speaker post, found themselves paired against other incumbents under the new district-

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[242]"One-Member State House Districting in Mississippi Decreed," *Houston Chronicle* (hereinafter referred to as "*HC*"), June 4, 1971, p.1.

[243]House Study Group, "Redistricting, Part Four: The Voting Rights Act," Special Legislative Report No. 60, in 1981 Texas Section 5 Submission, U.S. Dept. of Justice, pp. 30-31.

[244]Robert A. Calvert and Arnoldo De Leon, *The History of Texas* (Arlington Heights, IL: Harlan Davidson, Inc., 1990), pp. 395-97.

[245]"Blacks Lobbying Here," *Austin American-Statesman* (hereinafter *AAS*), May 20, 1971, p. 10; Glen Castlebury and George Kuempel, "Special Session Ordered," *ibid.*, June 1, 1971, p.1; Reid Beveridge, "Mutscher Foes Wipe Out 102 Bills in House," *HC*, June 1, 1971, p.1; "Smith Calls Legislature Back," *ibid.*, June 1, 1971, p.1.

ing arrangement.[246] Announcing a suit demanding single member districts in the state House the day after the passage of the reapportionment scheme, State Republican Party Chairman Dr. George Willeford remarked that "We will no longer stand idly by while a clique of political demagogues doles out the state's 150 House seats to suit its own vested interest."[247]

Personal, ideological, racial, and partisan motives also played major roles in the 1971 redistricting for Congress, a task too full of conflict to be completed during the legislature's regular session. In West Texas, Mutscher paired Republican Bob Price with Democrat Graham Purcell in order to save the underpopulated seats of three other Democrats, Omar Burleson, Clark Fisher, and Abraham Kazen, while Redistricting Committee Chairman Delwin Jones wanted to sacrifice any or all of them to protect his friend George Mahon.[248] In East Texas, two legislators who were on the conference committee that was trying to reach final agreement on congressional lines, Rep. Clyde Haynes and Sen. Charles Wilson, sparred over which one of them a new district would be tailored for.[249] In burgeoning Houston, Barbara Jordan, the first African-American to serve in the Texas State Senate in this century, a forceful woman who somehow always managed to stay in the good graces of the party and legislative leadership, was allowed to draw her own congressional seat. She subsequently won the 1972 Democratic primary, defeating the more stridently reformist Curtis Graves, and easily swept the general election to become the state's first black member of Congress in the century.[250] A third new district, the 24th, spanning Dallas and Tarrant counties, was widely ridiculed. Republican Rep. Fred Agnich described it as "preposterous," liberal Democratic Rep. Dick Reed termed it a "kind of monster," and the ever-colorful state Sen. Oscar Mauzy declared that "A 1-eyed 1-legged justice of the peace in Langtry would know more than to draw something up like that." All agreed that it was not

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[246]George Kuempel, "Mutscher Critics Proposed Targets," *AAS*, May 27, 1971, p.1; Richard M. Morehead, "Smith Calls Special Session: Legislature Fails to Act on Redistricting," *Dallas Morning News* (hereinafter *DMN*), June 1, 1971, p.1.

[247]George Kuempel, "Redistricting Plan Debate Set Today," *AAS*, May 28, 1971, p.1.

[248]"Redistricting Bill Ignores Difficult Houston Issues," *AAS*, May 13, 1971, p.2; Reid Beveridge, "Legislators Worked Down to Wire, Didn't Finish Districting Bill," *HC*, June 1, 1971, p.1.

[249]Reid Beveridge, "Legislators Worked Down to Wire, Didn't Finish Districting Bill," *HC*, June 1, 1971, p.1; Beveridge, "East Texans Have Panel in a Snarl On Redistricting," *ibid.*, June 3, 1971, p.1. The opening for drawing a new district came with the bribery indictment and illness of Congressman John Dowdy, which left him defenseless against being paired with a stronger incumbent, Wright Patman. "Williamson County No Longer Pickle's," *AAS*, June 5, 1971, p.1, c.1.

[250]"Pending Plan would Deny County an Extra Senator," *HC*, June 1, 1971, p. 24; Art Wiese, "Minorities increase number in legislature," *Houston Post* (hereinafter "*HP*"), May 9, 1971, p. 6/A, c.1.

"compact," and many noted the jagged edge caused by shifting ten black precincts in South Oak Cliff from the Fifth District, a move apparently designed to preserve conservative control of the Fifth.[251] Reflecting the rural conservative dominance of the process, the underpopulated districts of rural congressional and state Senate incumbents were preserved by adding small parts of the urban counties, severely fraying the boundaries of Houston, Bexar, Dallas, and Tarrant counties.[252]

Race-conscious, discriminatory motives, oddly-shaped districts tailored for personal, partisan, ethnic, or ideological purposes, covert designs and closed processes permeated the 1971 redistricting in Texas. These traditional Texas districting principles would continue to be followed and elaborated on over the next two decades.

2. Judicial Epilogue

Although in 1965, a Texas state court had refused to overturn multimember districts as racially discriminatory *per se*,[253] Curtis Graves carried his legislative attack on such districts into federal court as soon as the redistrictings for both houses had been completed in 1971. Appropriately suing Lt. Gov. Ben Barnes, Graves's lawyers succeeded in convincing a federal court to outlaw multimember State House districts in Dallas and Bexar counties. When *Graves* v. *Barnes* was appealed to the U.S. Supreme Court, it became the landmark *White* v. *Regester*, still the fountain of voting rights law in the United States.[254] Nonetheless, the state did not submit willingly. Another *Graves* decision in 1974[255] was necessary to impose single-member districts in seven more counties, and even though the legislature in 1975 acceded to abolishing the remaining multimember seats, it drew what the U.S. Department of Justice ruled were racially discriminatory lines in Tarrant, Nueces,

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[251]Reid Beveridge, "Court Decision May Threaten Redistrict Bill," *HC*, June 5, 1971; "Redistricting Plan Draws Fire," *DMN*, June 6, 1971, p. 6A; Tom Johnson, "Dallas Short-Changed in Districting," *ibid.*, June 6, 1971, p.1; "Comment on the Texas Congressional Redistricting Submission by Black and Hispanic Members of the state Legislature," Oct. 19, 1981, p. 4, in Texas 1981 Section 5 File, U.S. Dept. of Justice.

[252]"Redistricting Bill Said Unfair to City," *AAS*, May 23, 1971, p.9; "Pending Plan Would Deny County an Extra Senator," *HC*, June 1, 1971, p. 24; Tom Johnson, "Dallas Short-Changed in Districting," *DMN*, June 6, 1971, p.1; "Congressional Districting Confined to Rural Guideline," *ibid.*, June 6, 1971, p. 6A.

[253]*Hainsworth* v. *Martin*, 386 S.W. 2d 202 (Tex. Civ. App. -- Austin, writ ref'd n.r.e.), *vacated as moot*, 382 U.S. 109 (1965).

[254]*Graves* v. *Barnes*, 343 F.Supp. 704 (W.D.Tex. 1972); *White* v. *Regester*, 412 U.S. 755 (1973).

[255]*Graves* v. *Barnes*, 378 F.Supp. 640 (W.D.Tex. 1974).

and Jefferson counties.[256] It was not until 1978 that an unchallenged election was finally held in the state.[257]

Although the 1971 congressional arrangement did not suffer such wholesale alterations as the state legislative plans did, it was challenged in court and significantly amended. Finding a constitutional violation in a variation of 4.1% between the most heavily and least heavily populated districts, a federal court attempted to order into effect a set of lines that differed markedly from those that the legislature had adopted. After the U.S. Supreme Court scolded the three-judge panel for not showing sufficient deference to the legislative will, the panel adopted a scheme that more closely tracked the state's choices.[258] One of its most important changes moved ten black Dallas precincts from the 24th District to their original home in the 5th before the 1976 elections, a change that led directly to the replacement of 5th District Republican congressman Alan Steelman by liberal Democrat Jim Mattox and indirectly to the principal controversy of the 1981 redistricting.

D. THE 1980s: PARTISANSHIP, IDEOLOGY, AND INFLUENCE[259]

1. The Changed Political Context

By ending the career of the heir-apparent of the John Connolly wing of the Democratic party, Ben Barnes's entanglement in the Sharpstown imbroglio created a vacuum in Texas government. After Barnes finished third in the 1972 Democratic gubernatorial primary and Connolly bolted the party altogether, the colorless Dolph Briscoe did not so much fill as personify the empty space left by

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[256]The Justice Department was involved because in 1975 Texas became a "covered jurisdiction" under the Voting Rights Act. As a consequence, under Section 5 of the Act, every change in district lines had to be precleared by the Department, a development that provided all sides in 1980 with a further strategic tool.

[257]Bickerstaff, "State Legislative and Congressional Reapportionment," 2-4.

[258]Bickerstaff, "State Legislative and Congressional Reapportionment," 3-4. The principal decision was *White* v. *Weiser*, 412 U.S. 783 (1973).

[259]Since she had been chief counsel for the Republican State Committee of Texas during the political and legal struggle over reapportionment from 1981-83, Judge Edith H. Jones must have been fully cognizant of the connection between partisanship and race during Texas redistrictings prior to 1991 and of charges of "racial gerrymandering" during the 1981 reapportionment. In the circumstance, some judges would have recused themselves from deciding *Vera* v. *Richards*. Certainly, one would not have expected Judge Jones to ignore evidence of past discrimination in redistricting as a possibly compelling state interest when it was presented to her, and she knew of a great deal of it from personal experience.

the departure of the state's strong men.[260] Into that gulf in 1978 marched Dallas businessman William Clements, a staunch conservative, even by Texas standards, who eked out a bare margin over Democratic nominee John Hill, who had beaten Briscoe in the Democratic primary.[261] The veto power held by Clements, the first Republican governor in Texas since Reconstruction, radically changed the game of redistricting in 1981.

The most visible symbol of the rise of the GOP in Texas, Clements was not the only Republican with an influence on redistricting in the 1980s. Instead of ten Republicans in the lower house of the legislature, as there were in 1971, there were 38 in 1981. Although most of the additional 28 replaced conservative Democrats, that wing of the party, led by House Speaker Billy Clayton and Lt. Gov. Bill Hobby, was still dominant in both houses of the legislature, and conservative Democrats still filled most congressional seats. But the liberal wing, personified by John Bryant, chairman of the House Study Group, could not be ignored, and the Democrats as a whole organized a party caucus, a tactic that had not been necessary since the days of Populism in the 1890s. Thus, 1981 was the first redistricting of the twentieth century in which more than one partisan interest played an active role.[262]

Paralleling developments in the legislature were party and ideological bifurcations in the congressional delegation. In Dallas, liberal Jim Mattox of the 5th District was joined in 1978 by moderate-liberal Martin Frost in the adjacent 24th, while in the Houston area, Republican Ron Paul's 1978 victory was followed by that of Jack Fields, who rode Ronald Reagan's 1980 coattails to defeat perhaps the most liberal Anglo Democratic congressman from the South, Bob Eckhardt. In Corpus Christi, moderate Democrat Bill Patman enjoyed strong Hispanic support in his successful campaign to replace his conservative fellow party member Joe Wyatt in 1980. The principal objectives of the Republican/conservative Democratic coalition during the 1981 redistricting were to strengthen Fields, to weaken Patman and Paul (who had by far the most liberal voting record of any Texas Republican in the 1981 Congress),[263] and to destroy Frost and Mattox.

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[260]State legislator and "Dirty Thirty" member Frances Farenthold's effort to substitute a strong woman for a strong man fell short in the 1972 Democratic runoff.

[261]Calvert and De Leon, *History of Texas*, pp. 435-36.

[262]Anne Marie Kilday, "Redistricting battle: Democrats joking about putting Gov. Clements in county district dominated by minorities," *HC*, Aug. 9, 1981, section 1, p.12, c.1; Robert Harmel and Keith E. Hamm, "Development of a Party Role in a No-Party Legislature," *Western Political Quarterly*, 39 (1986), 79-92.

[263]Although popularly considered a right-winger, Paul only voted with the *Congressional Quarterly* "conservative coalition" 62% of the time in 1981, far below the 94% average of the other four Texas Republicans in that session. *Congressional Quarterly Almanac* (1981), p. 39-C.

2. The First Battle of Dallas

The feisty Clements, still inexperienced in Texas state government after a couple of relatively unproductive years in office, held two major weapons besides his veto and his *de facto* alliance with Speaker Clayton and Lt. Gov. Hobby: wealthy lobbyists and the Voting Rights Act. An organization of big businessmen formed the morning after a $2.8 million Clements fund raiser, "Texans for a Conservative Congress"[264] spent $76,000 organizing many of the chief patrons of Texas legislative campaigns to lobby the objects of their past donations to vote for districts that helped Republicans in particular and conservatives in general. Bankers, perhaps half-jokingly, threatened to call in the loans of legislators who did not cooperate.[265] Another group, the "Texans for Fair Redistricting Committee" (reported to be a front for oil and business political action committees) sent a letter to legislators promising to base future contributions on whether legislators supported the redistricting plan that Gov. Clements favored.[266] Money may well have determined the outcomes of a series of extremely close votes in both houses of the legislature.

At the same time that Republicans in Congress were scathingly attacking "proportional representation" for minorities during the debate over the renewal of the Voting Rights Act, Republicans in Texas were insisting on proportional representation of minorities in Dallas to weaken liberal Democratic congressmen. Noting that the total black population of Dallas County amounted to 54.6% of that of an ideal congressional district and that if all were put into one district -- a difficult task, for despite continuing prejudice and discrimination, not all Dallas blacks were segregated into a compact area -- they would drain enough Democratic votes from Jim Mattox' Fifth District to make it solidly Republican, Gov. Clements professed a conversion to black empowerment, promising to veto "any plan that did not create a minority district in Dallas County and restrict all of Democratic Congressman Jim Mattox' Fifth District to the county."[267] "The black community of Dallas wants

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[264]Ruben Bonilla, former National Director of LULAC, quipped that the organization should be named "Texans for a Bigoted Society." *Corpus Christi Caller-Times*, June 26, 1981, quoted in "Comment on the Texas Congressional Redistricting Submission by Black and Hispanic Members of the State Legislature" (Oct. 19, 1981), in 1981 Section 5 submission, Justice Department, p. 20.

[265]Sam Attlesey, "A stunning victory for conservatives," *Texas Business*, Oct., 1981, pp. 105-11.

[266]John C. Henry, "House members react angrily to remap threat," *AAS*, Aug. 9, 1981, p. B13, c.1.

[267]The sentence is a reporter's paraphrase in Sara Lee Tiede, "Redistricting impasse goes down to wire," *Dallas Times-Herald* (hereinafter *DTH*), June 1, 1981. Clements's insistence on confining the district to Dallas county is another sign of his partisan purpose, for the Democrats' obvious counter-ploy to an attempt to carve an African-American district out of districts 5 and 24 was to extend each into rural and small town Democratic areas in surrounding counties.

its own representative and they are not better served by two liberal white Democrats," he announced.[268] Although the Governor testified under oath to his devotion to the election of a black member of Congress and his lack of involvement in the details of the process, and although he once assured skeptical reporters that he had never calculated the political effect of any changes in congressional districts, Clements refused to support a plan that would create a majority/minority district in Dallas without turning another district Republican, declaring that the choice "comes down to whether the conservatives will hang together and do what's right for Texas, which is a conservative state, or whether we're going to let the tail wag the dog and let these liberals carry the day."[269] This was tantamount to an admission that it was ideological and partisan conservatism, not racial liberalism, that explained Clements's stance. Dallas African-American leader Isaac Johnson echoed the charges of many other Democrats, white as well as black, when he contended that Clements "does not care about blacks and browns in Dallas, only about the political fortunes of the Republican party."[270]

The African-American community in the state was deeply split over whether to attempt to create a "black district" in Dallas in 1981.[271] An *ad hoc* "Coalition for Minority Representation," led by former Dallas City Councilwoman Lucy Patterson, former state House member Eddie Bernice Johnson, Progressive Voters League officers Jesse Jones and John Wiley Price, and Dallas City Councilman Fred Blair, contended that it did not matter how liberal the voting records of Jim Mattox and Martin Frost were[272] or how much effort they devoted to their black constituents, they should be replaced

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[268]"Redistricting plan irks Clements," *HP*, Mar. 2, 1982, p. 22C, c.1. Similarly, see Sam Attlesey, "Poll shows Frost leading challengers," *DMN*, Nov. 5, 1981, p. A31.

[269]Felton West, "Clements answers queries about redistricting plan," *HP*, Dec. 5, 1981, p.6A, c.1; Ann Arnold, "Opponents of redistricting bill prepare challenges," *Ft. Worth Star-Telegram* (hereinafter *FWST*), Aug. 12, 1981; Anne Marie Kilday, "Clements says he'll veto redistricting bill," *HC*, Aug. 7, 1981. Victoria Loe, "The Deal That Didn't Work," *Texas Monthly* (Aug., 1981), p.222, paints Clements as extremely involved in detailed redistricting deal-making.

[270]Richard Fish, "2 redistricting bills advancing in Senate," *HC*, July 15, 1981. For similar statements, see George Kuempel, "Panel urges black district in Dallas," *DMN*, July 16, 1981, p. 34A; Anne Marie Kilday, "Tug-of-war: Ogg blocks Democratic redistricting plans, has own compromise tabled," *HC*, July 21, 1981, section 1, p.8; Sam Attlesey, "Political supporters of minority districts crusade in churches," *DMN*, July 27, 1981, p.13A; Dave McNeely, "Democrats try to corner Clements with minority district," *AAS*, Aug. 6, 1981.

[271]William K. Stevens, "Texas Redistricting Plan Splits Black Leaders," *New York Times*, Dec. 20, 1981, p. 15. In 1970, there were only 220,412 African-Americans in Dallas county, or 47.2% of the population needed for a congressional district, even if all could somehow have been included.

[272]In 1981, Mattox and Frost were the two most liberal Anglo congressmen in Texas. On the *Congressional Quarterly* "conservative coalition" index, Mattox scored 25 out of 100 on the roll calls on which he was present, second in the delegation only to black congressman Mickey Leland's 9%. Henry Gonzales of San Antonio was third,

because, as whites, they were incapable of truly representing African-Americans. "Congressman Mattox is Anglo, and Congressman Frost is Jewish," declared Lucy Patterson, and therefore, "They cannot fully understand the needs of the black community."[273] Chris Reed Brown of Dallas told a meeting of the Democratic State Executive Committee that Frost owed it to blacks to leave the district, move to College Station, and run against conservative Democrat Phil Gramm. Brown and her fellows joined Gov. Clements, Speaker Clayton, Lt. Gov. Hobby, and House Redistricting Committee[274] chairman Tim Von Dohlen (D-Goliad) in backing S.B.1, a bill carried in the Senate by conservative Democrat John Wilson of La Grange.[275] Somewhat unselfconsciously, "Coalition" members, who had drawn their map with the help of the county Republican chairman, accused African-Americans who disagreed with them of "selling out to the white power structure," or, more picturesquely, of being "water boys" for "political slave traders" -- i.e., white moderate and liberal Democrats. Disagreements became so heated once that a security guard had to restrain a "Coalition" member from assaulting a minority legislator.[276]

Thirty-three of the thirty-four minority legislators, though probably not most black leaders in Dallas, backed the approach of the principal contending bill, S.B.3, sponsored by Senators Oscar Mauzy (D-Dallas) and Peyton McKnight (D-Tyler), but principally drafted by Democratic congressmen Jim Wright of Ft. Worth and Martin Frost.[277] S.B.3 preserved the districts of Frost and Mattox and

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with 32%, and Frost fourth, with 56%. The average for the five Texas Republican congressmen in the same session was 88% conservative. *CQ Annual* (1981), at 39-C. In the rankings of the Leadership Conference for Civil Rights for the 1980 session, Frost and Mattox both scored 71, ranking behind only Gonzales, Leland, Jim Wright of Fort Worth, and Bob Eckhardt of Houston. Black and Hispanic Members of the Texas Legislature, "Retrogressive Effect of Texas Congressional Redistricting Plan: Reduced Ability of Minority Groups to Elect their Choices to Office," in 1981 Texas Section 5 Submission to Department of Justice, pp. 6-7.

[273]"Minorities need safe district, coalition tells state Senate," *DMN*, July 14, 1981, p. 19A; Alan Ehrenhalt, "Pulling Away from the Racial Gerrymander," *Perspectives* 83 (Winter-Spring, 1983).

[274]Although formally the "House Committee on Regions, Compacts and Districts," the committee was uniformly referred to as the Redistricting Committee. I will adopt that usage here. The Senate conducted its redistricting business in the Committee of the Whole, rather than through a smaller standing or special committee, apparently to give Lt.Gov. Bill Hobby the right to vote on bills, a right that he as presiding officer would not have had in a regular committee. Richard Fish, "Senate tentatively OKs redistricting proposal," *HC*, July 16, 1981.

[275]Sam Attlesey, "Redistricting showdown puts political futures on the line," *DMN*, July 20, 1981, p. 19A.

[276]Erenhalt, "Racial Gerrymander;". Victoria Loe, "The Deal that Didn't Work," *Texas Monthly* (Aug., 1981), p. 215; Sam Attlesey, "Ragsdale caught in middle," *DMN*, Aug. 2, 1981, p. 29A.

[277]"Minorities need safe district, coalition tells state Senate," *DMN*, July 14, 1981, p. 19A.

split Dallas blacks at the Trinity River, as they had been split in the *White* v. *Weiser* court-ordered plan in 1973.[278] Although Sen. Wilson charged that S.B.3 was "only based on protecting incumbents,"[279] its black and white defenders, led by the chairman of the legislative Black Caucus, Rep. Craig Washington (D-Houston), combined high principle with practical politics in pressing for it. On the one hand, Washington argued that "Anything that packs blacks to guarantee that a black is elected while minimizing black political influence is patronizing and we should fight it." "The ultimate goal," he said in a deposition, "is not to elect black and brown faces but to insure whoever is representing those black and brown people who vote represents their best interests."[280] Challenging S.B.1 with an elaborate analysis that showed stark differences between the voting records of Anglo members of Congress from Texas whose districts contained significant percentages of minorities and those who did not, black and Hispanic members of the legislature concluded in a letter to the Justice Department that "a Congressman does not have to be Black or Hispanic in order to be responsive to the needs of minority communities."[281] On the other hand, Paul Ragsdale, a black state representative from Dallas who, like Washington, was a member of the House Redistricting Committee in 1981, pointed out that it was virtually impossible to draw a congressional district in Dallas that would have an actual majority of black voters. S.B.1's "black district" was less than 47% black in population and no doubt even less in voting-age population,[282] blacks registered and turned out to vote at disproportionately low levels, compared to Anglos, and Hispanics, minority legislators showed

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[278]Richard Fish, "2 redistricting bills advancing in Senate," *HC*, July 15, 1981.

[279]Richard Fish, "Senate tentatively OKs redistricting proposal," *HC*, July 16, 1981.

[280]Sara Lee Tiede, "Redistricting impasse goes down to wire," *DTH*, June 1, 1981; Craig Washington deposition in *Seamon* v. *Upham* (Nov. 24, 1981), p. 66.

[281]"Retrogressive Effect of Texas Congressional Redistricting Plan: Reduced Ability of Minority Groups to Elect their Choices to Office," in 1981 Section 5 submission, Justice Department, pp. 6-7. The contrast with North Carolina is presumably because of the more urban nature of Texas. Urban Anglo Democratic voters appear to be less generally conservative than those from rural areas. In North Carolina, the district of the least conservative white Democratic members of Congress were usually centered either in Greensboro/High Point or the Research Triangle.

[282]Although the 287,541 blacks constituted 18.5% of the total population in Dallas county in 1980, the 180,640 over the age of 18 represented only 16.3% of the total voting age population in the county. If the same ratio of voting age to total population held in the S.B.1 "black district," then blacks would constitute only 41-42% of the voting age population. If they registered and turned out at levels comparable to the whole state, they might have constituted only about 35-38% of the total electorate in the district, even if almost no Hispanics voted. Since the district was packed with Democrats and there was no requirement that one be a long-time member of a particular political party to vote in its primary, blacks could probably not hope to constitute much more than 40% of the Democratic primary electorate in the district.

in a letter to the Justice Department, did not generally support black candidates against Anglos in Democratic primaries in Dallas. "You can't get a majority black district in Dallas County even with gerrymandering," contended Ragsdale, who had drawn the state House districts for the county. "If you could do it, I'd already have done it," he concluded. What good did it do, minority legislators who opposed S.B.1 on final passage asked, to draw a 47% black district containing the homes of Frost and Mattox when Frost, who had already collected $200,000 in campaign contributions and who had long carefully cultivated black support, would almost certainly beat any black opponent?[283] If Frost won, all the bitter struggle would have accomplished was the substitution of a conservative Republican for Mattox, whose views were far closer to those of the vast majority of blacks, and increased antipathy between blacks and their day-to-day white allies -- another reason, of course, for Clements and other conservatives to support S.B.1.

When S.B.1 passed, "Coalition" African-Americans cheered, Frost prepared to run for Congress in the "black district" anyway, Mattox bounced into the race for State Attorney-General, and minority legislators and their allies lobbied the Justice Department and sued in federal court. The suits were partially successful, as a three-judge court, and, in 1983, the legislature, restored virtually the S.B.3 boundaries in Dallas.[284] Frost and John Bryant, whose voting record closely paralleled Mattox's, filled the 24th and 5th District seats for the rest of the 1980s. But what Paul Ragsdale called a "blood

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[283]Sam Attlesey, "Political supporters of minority districts crusade in churches," *DMN*, July 27, 1981, at 13A; "Comment on the Texas Congressional Redistricting Submission by Black and Hispanic Members of the State Legislature" (Oct. 19, 1981), in 1981 Section 5 submission file, Justice Department, at 12-15. According to this "Comment," the Southwest Voter Research Institute "reported that in 1980, 68.4% of the Anglos, 60% of the Blacks, and 57% of the Hispanics of voting age were registered. In the Democratic primary in 1980, 68.4% of the registered Anglos, 17.3% of the registered Hispanics and 17.69% of the registered Blacks took part. In the general election, 60.9% of the Anglos, 52% of the Hispanics and 50.5% of the Blacks turned out." (at 17) Although a spirited black campaign might have spurred African-American voters to turn out at much higher levels in a primary, it seems very doubtful that they could have closed the 50% gap between black and white participation rates.

On Frost's campaign fund, see Arthur Wiese, "Blacks' chances," *HP*, Dec. 6, 1981, at 6D. In November, 1981, with the "black district" newly established by S.B.1 and with the momentum generated by their public lobbying for it, highly visible black candidates Lucy Patterson and Eddie Bernice Johnson trailed Frost by approximately 2-1 in trial runs in public opinion polls. Sam Attlesey, "Poll shows Frost leading challengers," *DMN*, Nov. 5, 1981, p. A31. In a district redrawn by the three-judge panel in *Seamon* v. *Upham*, which approximated the division in S.B.3, Frost crushed Patterson, who switched parties to run against him as a Republican in 1982. Patterson is estimated to have received only about 6% of the black votes in overwhelmingly African-American precincts. Ehrenhalt, "Racial Gerrymander"; testimony of Prof. Larry Carlile before Texas House, May 16, 1983, cited in John W. Fainter, Jr. to William French Smith, July 21, 1983, in 1983 Texas Section 5 submission, Justice Department.

[284]*Seamon* v. *Upham*, 536 F.Supp. 931 (E.D.Tex. 1982); *Upham* v. *Seamon*, 456 U.S. 37 (1982); *Seamon* v. *Upham*, 536 F.Supp. 1030 (E.D.Tex. 1982); *Seamon* v. *Upham*(Civil Action No. P-81-49-CA, E.D.Tex., slip opinion, Jan. 30, 1984); Ron Calhoun, "White's mixed signals," *DTH*, June 27, 1983; "U.S. court upholds Texas redistricting," *HP*, July 31, 1984.

bath" within the black community and between blacks and liberal Anglos, reverberated into the next decade.[285] In 1991, Republicans would try again to divide liberals along racial lines, and Democrats would try not to make the same mistakes twice.

3. South of Houston

The shoot-out over Dallas was not the only reason for the long, bitter, and closely-contested struggle over congressional reapportionment in 1981. Because of population growth during the 1970s, Texas gained three new congressional seats after the 1980 census. Everyone agreed that one of the three should be a safe Republican seat in the Dallas suburbs, and that another should be somewhere in Harris county, with a district in the northern suburbs helping the Republicans, one in the south probably Democratic, and one in the center city possibly endangering the only district held by an African-American, Mickey Leland, who had succeeded Barbara Jordan when she retired from office in 1978. Latinos wanted the third to be in South Texas, and during the Special Session, Hispanic legislators Matt Garcia and Al Luna unsuccessfully pressed for a plan that balanced the Hispanic percentages in the existing 15th District, represented since 1964 by the conservative Mexican-American Eligio De La Garza, and a new 27th District, instead of packing Hispanics into the 15th. Under S.B.1 and S.B.3 (both of which followed an earlier MALDEF proposal), the Hispanic population proportion in the 15th District would be 81%, while that in the 27th would be 55-56% -- probably not enough for Mexican Americans to elect a candidate of their choice. The Garcia-Luna amendment, which was in effect later adopted by the three-judge federal court in *Seamon* v. *Upham*, after the Justice Department had objected to the packing in District 15 under S.B.1, made the percentages 71 and 65, respectively.[286] The point is that neither Republicans nor Democrats were fully responsive to expressed Hispanic interests in South Texas. This was a record that might be used in a Section 2 or constitutional challenge against a 1991 plan if redistricters in the latter year again proved unresponsive.

Instead of inserting a new district in South Texas, House Redistricting Committee Chair Tim Von Dohlen split Corpus Christi and twisted the 14th District into a shape that reminded state House member Hugo Berlanga (D-Corpus Christi) of a dragon, keeping only 40% of the previous District 14's population.[287] One of the reasons that the relatively moderate Bill Patman had won the 14th District contest in 1980 was that the minority percentage in the district was 45.4%. S.B.1 reduced that

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[285]Transcript of Floor Debate in Texas House of Representatives on S.B.480, May 26, 1983, p.5.

[286]William Bradford Reynolds to David Dean, Jan. 29, 1982, in Texas 1981 Section 5 submission file, Justice Department; Judy Wiessler and Bo Byers, "U.S. balks at Texas proposal for congressional redistricting," *HC*, Jan. 30, 1982, p.1, c.3; "U.S. Judges Alter Districts in Texas Congressional Map," *New York Times*, Feb. 28, 1982.

[287]Jose Comacho *et al.*, "Brief of Intervenors Matt Garcia, *et al.*, in *Seamon* v. *Upham*, p.30, n.5.

to 31.6%, halving the proportion of Hispanic voters who had, observers claimed, so strongly supported Patman. That was not enough for Von Dohlen, who reportedly planned to run against Patman if the new district were suitable, or for the Anglo businessmen of Corpus Christi, who argued and lobbied the legislature long and hard to divide their city along ethnic lines, putting Anglos into one congressional district and Mexican-Americans in another.[288] According to Ruben Bonilla, the past president of LULAC, what he termed this "malevolent scheme to promote selfish personal economic vested interests" had been proposed because Patman and Sen. Carlos Truan, rather than the candidates favored by the "Anglo establishment" in Corpus Christi, had won in 1980.[289]

An opponent of Republican congressman Ron Paul, as well as of Patman and the Hispanic community's interests, Von Dohlen eventually abandoned his effort to split Corpus Christi and came up with the scheme of shifting Democrats into Paul's marginal district and Republicans into Patman's, attacking both congressmen with a simple swap that even moved Paul's house into Patman's district, forcing Paul either to run against Patman or to leave his Brazoria County home.[290] If Paul refused to move, either he or Patman would lose; if Paul followed his old district into Fort Bend County, that would open up the 14th for Von Dohlen's Republican friend, state House member Brad Wright, who would then, Von Dohlen hoped, eliminate Patman, whose district had been weakened. (Earlier, Von Dohlen had proposed to tailor a new district for Wright, but the Brazoria switch threw more stones and promised to knock off a pair of hated birds.)[291] By alienating both Paul's and Patman's friends in the lower house, however, Von Dohlen had overreached himself. The House rejected his proposal, 81-64, on the day that it finally adopted a congressional plan. Emphasizing Von Dohlen's failure to

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[288]Sara Lee Tiede, "Redistricting impasse goes down to wire," *DTH*, June 1, 1981; Hearing in House Committee on Redistricting, July 21, 1981, pp. 1-226.

[289]"Hispanic leader blasts reapportionment plan," *DMN*, June 26, 1981; Dave McNeely, "Congressional redistricting plan goes to House committee today," *AAS*, July 23, 1981, p.B4; Anne Marie Kilday, "New plan for Harris County stalls redistricting action in House," *HC*, July 24, 1981, section 1, p.9, c.1.

[290]While no state or federal law requires members of Congress to live in their districts, most do so, at least formally, for fear of being labeled "carpetbaggers" otherwise.

[291]Anne Marie Kilday, "Houstonians' political ambitions tangle House redistricting plans," *HC*, July 17, 1981; Dave McNeely, "Von Dohlen stalls redistricting battle," *AAS*, July 24, 1981, p.B2, c.2; Kilday, "Von Dohlen's redistricting plan OK'd by House committee," *HC*, July 28, 1981, section 1, p.9; McNeely, "House panel okays redistricting plan," *AAS*, July 28, 1981, p. B2, c.2; Kilday, "House urged to OK alternate redistricting plan," *HC*, July 29, 1981, Section 1, p.12; Mark Nelson and Sam Kinch, Jr., "GOP lawmaker denies favoring district split," *DMN*, July 29, 1981, p. 28A, c.1.

insure Patman's immediate defeat by himself or one of his friends, House Democratic Caucus Chairman Bob Bush asserted that Von Dohlen had "won the battle, but lost the war."[292]

4. Did Minorities Influence the 1981 Redistricting?

Although Speaker Billy Clayton put five members of minority groups on the House Redistricting Committee (Bob Valles of El Paso and Reby Cary of Fort Worth, as well as Washington, Ragsdale, and Berlanga), the minority comment to the Justice Department argued that minorities were "run over at every turn by the conservative White majority, the presiding officers of the House and Senate, and the Governor. We had little real impact on the final plan. We understand the sham that took place. The State systematically attempted to create the impression of minority legislators' participation when the truth is that there was none."[293]

The facts support the contentions of the 1981 "Comment." There were no blacks and only four Latinos in the Senate in 1981, and none played a role in framing S.B.1. Nor were the five House minorities on the Redistricting Committee consulted until Von Dohlen presented his plan. In fact, they did not receive data on the ethnic composition of the proposed districts until the day before the committee was first scheduled to vote on plans, and when Ragsdale tried to make a motion for delay, Von Dohlen ignored him and minority members stalked out in order to break the committee's quorum.[294] When the amended S.B.1 reached the floor, Ragsdale offered an amendment basically restoring the balance of the black population between districts 5 and 24, and when this lost, joined Carlyle Smith (D-Grand Prairie) in offering an amendment that designated district 5 as the majority-minority district and extended district 24 south into rural counties in an effort to preserve it for the Democratic party, if not for a moderate like Martin Frost. These and a similar proposal by Craig Washington lost by identical three-vote margins.[295]

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[292]Garth Jones, "Texas congressional redistricting plan up for final House vote," *HC*, July 30, 1981, section 1, p.23, c.1; Anne Marie Kilday, "GOP's redistricting approved by House," *ibid.*, July 30, 1981, section 1, p.10, c.1; Mark Nelson, "House approves new districts," *DMN*, July 30, 1981, p. A1,c.1; "House adjourned in bid to reach redistricting consensus," *HC*, July 31, 1981, section 1, p.3, c.1; Sam Attlesey, "Final vote on congressional redistricting delayed," *DMN*, July 31, 1981, p. 22A, c.1; Dave McNecley, "Final vote delayed on remap plan," *AAS*, July 31, 1981, p.B6, c.1.

[293]"Comment on the Texas Congressional Redistricting Submission by Black and Hispanic Members of the State Legislature" (Oct. 19, 1981), in Texas 1981 Section 5 Submission File, p.1.

[294]Id., at 23.

[295]"Ragsdale plans district fight on House floor," *DMN*, July 29, 1981, p. 28A, c.4.

At this point, for the only time in the session on the redistricting issue, Gov. Clements and Speaker Clayton lost control. In a decision described by an observer as "potentially devastating" for the conservative leadership, a momentarily unified Democratic caucus sent the reapportionment issue back to Von Dohlen's committee, apparently hoping that the group would amend the bill in line with the Ragsdale-Smith amendment, the effect of which would be to create the majority-minority district that Gov. Clements claimed to want, but to prevent Republicans from winning another seat in Dallas county. Demonstrating that partisan concerns really motivated him, Clements promised to veto Ragsdale-Smith. As another reporter put it, "The battle over congressional reapportionment reached full-scale partisan warfare . . . "[296] After both sides lobbied intensely, Speaker Clayton extracted the bill from the committee by threatening to refer it to another committee, amended S.B.1 to punish moderate Democrats even more and, after minority and other Democratic caucus members absented themselves to break a quorum, sent out Sergeants-at-Arms to arrest members in lobbies and hotel rooms, bring them back to the House at 4:45 am, and count enough of them as present to pass the congressional redistricting bill.[297] It was a classic exercise of strong-arm tactics by a powerful Texas Speaker out to preserve conservative control at practically any cost, and it came, as before, at the expense of moderate Anglo Democrats and over the vehement protests of black and Hispanic legislators.

5. The Conservative Attack on Minority Voters' Influence over Members of Congress

As passed, S.B.1 was a severe blow to minority influence on the congressional delegation. As Tony Bonilla, President of LULAC, put it picturesquely, "We've been raped again. The Republicans who ran under the Democratic banner have joined forces with the other Republicans to do a hatchet

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[296]Anne Marie Kilday, "Texas House stalls redistricting bill; action may force 2nd special session," *HC*, Aug. 4, 1981, section 1, p. 6, c.1; Mark Nelson, "Democrats back redistricting bill," *DMN*, Aug. 4, 1981, p.1A (first quote); Nelson, "House panel to go back to work on redistricting bill," *ibid.*, Aug. 5, 1981, p. 21A; Dave McNeely, "Democrats try to corner Clements with minority district," *AAS*, Aug. 6, 1981; Anne Marie Kilday, "Democrats stall redistricting bill to regroup legislative support," *HC*, Aug. 6, 1981, section 1, p. 12; Mark Nelson, "Democrats lobby senators on redistricting," *DMN*, Aug. 6, 1981, p. 30A; Anne Marie Kilday, "Clements says he'll veto redistricting bill," *HC*, Aug. 7, 1981 (second quote).

[297]Anne Marie Kilday, "Clayton threat gets redistricting bill out of committee," *HC*, Aug. 8, 1981; Mark Nelson, "Panel OKs district plan," *DMN*, Aug. 8, 1981, p. 40A; Kilday, "House approves congressional districting," *HC*, Aug. 10, 1981; Sam Attlesey and George Kuempel, "Democrats lambaste Clayton's Redistricting plan," *DMN*, Aug. 10, 1981, p. 20A; Dave McNeely, "Remap plan clears House, goes to Senate," *AAS*, Aug. 10, 1981, p.1A; "Comment on the Texas Congressional Redistricting Submission by Black and Hispanic Members of the State Legislature," p.29.

job on four of our fine progressive congressmen and have diluted and minimized the Hispanic vote."[298] During the 1980s, approximately 90% of blacks and 72% of Hispanics in Texas were Democrats. On the other hand, 90% of the Republican voters were Anglo.[299] Thus, any actions that substantially reduced the probability that a Democratic member of Congress could be elected disproportionately damaged the almost certain choices of minority voters.[300] In Dallas, the minority percentage in the 5th District was reduced from 29% to 12%, and the Democratic party's prospects in the district became hopeless. In Houston, the minority percentage in the 8th, which had been represented for more than a decade by the extremely liberal Bob Eckhardt, dropped from 40% to 29%, effectively guaranteeing the seat to the Republicans for the foreseeable future. In the 14th, Patman had not been damaged as much as Von Dohlen threatened to do, but the reduction in his minority percentage by nearly a third allowed Republicans to defeat him in 1984. The 22nd, the seat that Ron Paul had won after see-saw battles with moderate Democrat Bob Gammage during the 1970s, also saw a decline in minority percentage from 31% to 23%, and a consequent shriveling of Democratic chances. Overall, as black and Hispanic members of the legislature pointed out in a comment to the Justice Department, under the court-ordered plan from the 1970s, minorities could control 3 of the 24 seats and influence 9 others; under S.B.1, they still could control no more than 3, but they could only influence 7 of the expanded total of 27. This, they said, was retrogressive.[301]

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[298]Ann Arnold, "Opponents of redistricting bill prepare challenges," *FWST*, Aug. 12, 1981.

[299]Arnold Vedlitz, James A. Dyer, and David B. Hill, "The Changing Texas Voter," in Robert H. Swansbrough and David M. Brodsky, eds., *The South's New Politics: Realignment and Dealignment* (Columbia, S.C.: Univ. of South Carolina Press, 1988), Figure 4.4, at 49.

[300]I am not arguing here that voting for the Democratic party is in a normative sense in the best interests of African-Americans or Latinos, but only that their actions indicate that they believe that it is. It is certainly true, however, that public opinion polling data shows that on the vast majority of issues, blacks are substantially more liberal than whites, as are the records of such African-American members of Congress as Barbara Jordan, Mickey Leland, and Craig Washington. See section III. A., *supra*. Evidence on Latino opinion is sparser. The point is that Republicans win *despite* the votes of the vast majority of blacks and Hispanics, and that therefore, Republican members of Congress are essentially outside of their influence.

[301]Black and Hispanic Members of Texas Legislature, "Retrogressive Effect of Texas Congressional Redistricting Plan: reduced Ability of Minority Groups to Elect Their Choices to Office," in Texas 1981 Section 5 Submission File, Justice Department.

6. Review and Preparation for a Rerun

Texas politicians ritually repeat "good government" rhetoric less during redistricting than officeholders in other states do, and lack conviction when they do. As the 1971 experience did, the 1981 reapportionment only further demonstrated that the raw struggle for partisan, personal, and ethnic power rarely lies far below the surface of Texas politics. The attempt by the conservative Anglo legislature, only partially reversed by the courts in *Seamon* v. *Upham*, to buttress the electoral strength of conservative Congressmen and reduce that of moderates, the half-hearted and unconvincing use of the Voting Rights Act ploy by Governor Clements to cover a partisan power play, the strenuous efforts by Democratic incumbents Frost and Mattox to save their seats at the expense of principle or party, the dogged and partially successful effort by Von Dohlen to savage Patman and Paul, the blatant packing of Hispanics into the district of a well-established Hispanic incumbent, the exclusion of minority legislators from the real power to shape plans -- all of these facts would tilt the judicial scales even more against the State if the legislature were not more sympathetic to minority concerns in 1991. With the 1982 amendments to the Voting Rights Act, interpreted by many political activists to require creation of majority-minority districts whenever possible,[302] and with the increase of Hispanic population in Houston and South Texas and the lesser, but still appreciable rise of the black percentage in Dallas, minorities had an even stronger weapon than they had had available in 1981. The Republican strategy of forming a temporary alliance of convenience with minorities so as to weaken Democratic strength in adjacent districts had been so well rehearsed that by 1991, everyone knew their lines perfectly. All that was required for a revival of the stage production was an expected Republican victory in the 1990 gubernatorial election and an uncontroversial count in the 1990 census.

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[302]Thus, during debates over reapportionment, Sen. Teel Bivins (R-Amarillo), one of the Republican leaders on the issue, remarked, in a reporter's summary that "If it is possible to create a minority district, the [Voting Rights] act requires that one be drawn." Emily Alice Robbins, "West Texas lawmakers face tough redistricting battle," *Amarillo Sunday News-Globe*, Aug. 18, 1991. In an article on Texas redistricting, Thomas B. Edsall of the *Washington Post* said: "Under amendments to the [Voting Rights] act in 1982 and Supreme Court rulings since then, legislatures drawing district lines in areas with histories of racially polarized voting are effectively required to create districts giving blacks and Hispanics voting majorities whenever reasonably possible." Edsall, "Another Candidate for the Endangered Species List: White Democrats," *Washington Post National Weekly Edition*, June 3-9, 1991, p. 12. During the *Terrazas* v. *Slagle* trial before a three-judge federal panel, Sen. Sibley asked Sen. Eddie Bernice Johnson whether she had repeatedly told colleagues during the session "If you can draw a minority district, you must draw a minority district." Agreeing that she did, she justified the statement as reflecting her understanding of the Voting Rights Act. Trial Transcript, Dec. 12, 1991, at 253.

E: 1991: THE SEQUEL

1. Circumstances Changed, Lessons Learned

Republican gains in Texas during the 1980s -- a rise in State House members from 38 to 57 and in congressmen from 5 to 8 -- had the paradoxical effect of increasing Democratic cohesion and power during the 1991 reapportionment.[303] Instead of holding the governorship, enjoying a *de facto* alliance with the conservative legislative leadership, and facing a loosely organized opposition, Texas Republicans in 1991 confronted a newly elected and partisan Democratic governor, Ann Richards, and more moderate and less fractionated Democratic legislative and congressional delegations. The jump in Republican membership in the legislature also meant that African-Americans and Latinos made up a larger proportion of the Democrats -- 34% of the 181 members of the two houses, as opposed to 26% in 1981. More than ever, Democrats could not ignore their minority group members, and blacks and Hispanics appeared to be an ever more tempting targets for Republican deal makers. As in 1981, some minority politicians seemed receptive. "The best friend that minorities have," announced Houston City Councilman Ben Reyes, "is the Republican Party."[304]

The census results and the development of computer technology interacted with politics and legal developments to set the stage for reapportionment in 1991. For one thing, the burgeoning of the state's population added three seats to the congressional delegation, which made it possible to satisfy new demands while maintaining incumbents. But since most of the population growth occurred either in Republican-leaning suburbs or among Hispanics in Houston and South Texas, the new seats could go in two very different demographic, political, and geographical directions.[305] For another, the widely noted undercount, which was especially concentrated among minorities, and the decision by political appointees of the Bush Administration not to correct or update the results of the original census heightened the alienation of minority activists from the GOP.[306] For a third, rapid, frequent, and inexpensive redrawing of boundaries became possible and virtually inevitable during the consideration of district lines because of the extremely fine-grained population information made

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[303]The Texas legislature became more partisan throughout the decade of the 1980s. Robert Harmel and Keith E. Hamm, "Development of a Party Role in a No-Party Legislature," *Western Political Quarterly*, 39 (1986), 79-92.

[304]Alan Bernstein, "Seminar is held on plan to form Hispanic district," *HC*, Feb. 3, 1991, p. 4C.

[305]Alan Bernstein, "New 'Hispanic district' pushed," *HC*, March 21, 1991, p. 1A.

[306]R.G. Ratcliffe, "Census revise may add congressional seat," *HC*, March 23, 1991, p.30A; Alan Bernstein, "Republicans, Democrats agree on remapping for minority vote," *ibid.*, March 24, 1991, p. 2C, c.1; Sam Attlesey, "Minorities amass arsenal for redistricting 'war'," *DMN*, April 15, 1991.

available by the Census Bureau; because hardware and software developments facilitated the recalculation of linked political and ethnic statistics with every major or minor boundary change; and because the U.S. Supreme Court's decision in *Karcher* v. *Daggett* in 1983 that every population deviation between congressional districts was constitutionally suspect meant that a very large number of city and county boundaries would have to be breached.[307] As the Chairman of the House Redistricting Committee noted, "because of the tight [population] tolerance the courts have approved, there is no way that we can avoid county cuts."[308] Technical progress and inflexible legal rules, in other words, inevitably increased the conflicts in and the complexity of the redistricting process.[309] For a fourth, numerous successful minority voting dilution cases during the 1980s, particularly the massive documentation of racially polarized voting and discrimination in *Williams* v. *City of Dallas*,[310] issued in 1990 on the eve of reapportionment, surely reminded the legislators of their potential liability if their plans failed to allow Hispanics and African-Americans an equal opportunity with Anglos to elect candidates of their choice.

Anglo Democrats had also learned certain lessons from the 1981 experience. Not only were they better organized this time, but they did not ignore finances. In 1981, only the conservative Democrat-Republican coalition had brandished promises of campaign money before legislators during reapportionment. A decade later, the Democratic congressmen most obviously threatened by redrawing lines, Martin Frost of the 24th and John Bryant of the 5th, had made 1990 campaign contributions of $56,700 to state legislators. Frost alone contributed to 19 of the 23 Democratic winners in the State Senate and 45 of the 92 in the House, gifts that probably at least assured him an audience to plead his case.[311] Moreover, early in the process, Democrats decided to make minorities a better offer than Republicans could afford to tender. Republicans initially hoped that one or two of

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[307]Sam Attlesey, "Redistricting work proceeds under cloud of litigation," *DMN*, Aug. 25, 1991.

[308]Texas House Floor Debate, Transcript of Audiotapes, Aug. 21, 1991, p.7.

[309]It is disingenuous for opponents of the 1991-92 reapportionments to compare the number of divisions in counties and precincts with those of the 1980s plans, because the "zero tolerance" that many redistricters thought the *Karcher* decision required forced many more cuts. For the disingenuity, see Vorhees's dissent in *Shaw* v. *Barr*, at 477; *Vera* v. *Richards*, *supra*, n. X, at 1334.

[310]734 F.Supp. 1317 (N.D. Tex. 1990). For a listing and extensive discussion of other cases see Robert Brischetto, David R. Richards, Chandler Davidson, and Bernard Grofman, "Texas," in Davidson and Grofman, eds., *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990* (Princeton, N.J.: Princeton Univ. Press, 1994), 233-70.

[311]Chuck Alston, "Incumbents Share the Wealth, With Redistricting in Mind," *Congressional Quarterly Weekly Report*, 49, #21 (May 31, 1991), pp. 1343-50.

the three new congressional seats would be located in the suburbs, and both leaders and followers pushed for this. Hoping to head off a minority-Republican coalition, knowing that, except in extraordinary circumstances, every minority seat was a Democratic seat, and realizing that they would be able to craft districts to accommodate both new minority and incumbent Democratic positions, the Democrats announced that all three of the new districts should go to minorities -- Latino districts in Houston and South Texas and a black district in Dallas.[312]

2. The Second Battle of Dallas

With Democrats in control of the legislature and the executive, with both political parties and all of the pertinent leaders at least rhetorically committed to a new African-American congressional district in Dallas, with a Dallas county black population now amounting to 65.3% of the ideal congressional district, with extremely detailed ethnic and general population statistics available, and with a black State Senator, Eddie Bernice Johnson, as chair of the relevant subcommittee, it should have been relatively painless to agree on congressional district lines in the Metroplex. As Martin Frost put it optimistically when he endorsed the principle of a black Dallas district nearly a year before census data became available, "The minority population exists in Dallas County to create a majority-minority district. It's just a matter of drawing the lines."[313] Had the process taken place behind closed doors, without any necessity for public posturing and no premium on disagreements, instead of a relatively open process with plenty of opportunity for comments, criticisms, and redraftings, consensus would no doubt have come more quickly. Messiness is often a byproduct of reform.

The Frost and Bryant strategy was simple. There were two keys to electing a black member of Congress: first, make sure that no strong Anglo candidate ran in the district by giving potential candidates other winnable districts; second, make sure that the black population of the district comprised a comfortable majority of a probable Democratic primary electorate, and that the district contained enough reliable non-black Democrats to blunt any likely Republican campaign. The first principle, conveniently enough for the Anglo Democrats, suggested keeping Frost in his Oak Cliff base, letting him retain some South Dallas blacks, and cannibalizing Republican Joe Barton's 6th District, which stretched south from Dallas and Tarrant counties, to include enough Anglo Democrats to send Frost back to Washington. Bryant's 5th District would head south and east from its starting point in Dallas county. As the fourth-ranking Democrat on the influential Rules Committee in the

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[312]Alan Bernstein, "Republicans, Democrats agree on remapping for minority vote," *HC*, March 24, 1991, p.2C, c.1; Sam Attlesey, "Democrats land heavy blows in redistricting," *DMN*, April 7, 1991; Dave McNeely, "Redistricting mostly pluses for Democrats," *AAS*, April 21, 1991, p. B1.

[313]Ed Housewright, "Minority congressional district urged," *DMN*, July 14, 1990, p. 35A, c.1.

House and the new chairman of "IMPAC 2000," the national redistricting arm of the Democratic party, Frost's growing national power and proven fundraising ability would enable him to do well in a substantially redrawn district. Bryant, a practiced campaigner, would also survive.[314] The second principle suggested that the proportion of minorities did not have to be overwhelming, certainly not the much-mentioned 65% target, if a large number of the Anglos in the district could be expected to vote in the Republican primary. If the Dallas black district, early on given the number 30, went north into the affluent "Park Cities" (Highland Park and University Park), in other words, it could be fairly compact in shape and still leave enough blacks outside its southerly edge to keep Frost and Bryant happy and reelected.[315] These principles were implicit in the proposal agreed on by the Democratic members of Congress, which made district 30 a 61% combined minority district, 43% black and 19% Latino, and which, a historian hired by Frost contended on the basis of a statistical analysis of Dallas elections, could be carried by a black candidate. The keys were black and Anglo turnout in the primary, the level of Anglo Democratic support for a black candidate in the general election, and the relatively high percentage of Republicans -- 40% for President Bush in 1988 and 45% for Senator Phil Gramm in 1990 -- which meant that even with only 43% of the population, blacks alone might comprise two-thirds or more of the normal Democratic vote.[316]

But this was not the key for Sen. Johnson, who astonished her colleagues by announcing her candidacy for the seat even as its boundaries were being debated and who had more power to set its limits than anyone else did.[317] The key for her was to make it black enough to satisfy demands for a district that African-Americans could win without coalescing with anyone else, demands that had

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[314]R.G. Ratcliffe, "Redistricting becomes the ultimate power play," *HC*, Dec. 23, 1990; Seth Kanton, "Dallas congressman's stock rising in the 1990s," *AAS*, Dec. 23, 1990.

[315]Richard S. Dunham, "Johnson's redistricting plan seen as slap to Democrats," *DTH*, May 1, 1991; Dunham, "Minority seat may spell peril for 3 congressmen," *ibid.*, May 5, 1991.

[316]Sam Attlesey, "Minorities assail lines proposed for new district," *DMN*, April 16, 1991; R.G. Ratcliffe, "Witness says black could win in Dallas," *HC*, April 16, 1991; Dave McNeely, "Redistricting mostly pluses for Democrats," *AAS*, April 21, 1991, p. B1; Susan B. Glasser, "For Texas Redistricting, It's Make or Break Time," *Roll Call*, May 20, 1991; Allan J. Lichtman, "Analysis of Proposed Minority Congressional District, Dallas County, Texas," (typescript, July, 1991). If only 55-60% of the district's voters could be expected to participate in a Democratic primary, 43% of the population was black, and all the blacks were Democrats, blacks could compose 43/60 or more than two-thirds of the expected voters in a Democratic primary. If they united behind the black candidate, this left a good deal of slippage for a younger age structure and a lower turnout among blacks, even if a black candidate did not get a single Hispanic or Anglo vote.

[317]Gardner Selby, "Johnson confirms she'll seek congressional seat in '92," *DTH*, May 16, 1991.

festered since the days of the "Coalition for Minority Representation," of which she was a leading member,[318] but not black enough to elect someone else, particularly her chief rival, Dallas County Commissioner John Wiley Price. At first, Johnson proposed a district 30 that was 45% black and 21% Hispanic.[319]

The response to this plan is worth considering in considerable detail, because it demonstrates the widespread understanding among Republicans as well as Democrats, Anglos as well as African-Americans, that the shape of the 30th District would be determined by personal and partisan, as well as by racial factors. As Tom Pauken, then a radio talk show host and columnist for the *Dallas Times-Herald*, and now State Chairman of the Republican Party, noted, the argument was not over establishing a black district, but over whether to include Anglo and Hispanic precincts currently in Frost's district in the Grand Prairie area "in order to give her [Johnson] an advantage over John Wiley Price in a Democratic primary race. Price has very little political support outside the black community."[320] Frost agreed, telling the national magazine *Roll Call* that "The argument at this point is not over the minority content of the Dallas district. The argument is over white Democrats in Grand Prairie and Pleasant Grove."[321] Sen. Johnson herself noted that she'd gotten considerable support in her 1986 State Senate contest from Anglos in Grand Prairie, where her sister was Assistant Superintendent of Instruction in the public schools.[322] She was interested in extending the 30th District in that direction.

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[318]Lawrence E. Young, "GOP, blacks assail congressional map," *DMN*, Aug. 9, 1991; Fred Blair (D-Dallas), in Transcript of Texas House of Representatives Floor Debate, Aug. 21, 1991, pp. 196-7; Lawrence E. Young, "GOP, blacks assail congressional map," *DMN*, Aug. 9, 1991; Sam Attlesey, "Johnson to press for black district," *ibid.*, Aug. 10, 1991; Attlesey, "Remap decision called unlikely in session," *ibid.*, Aug. 12, 1991; R.G. Ratcliffe, "Drawing outside the lines," *HC*, Aug. 19, 1991; Dave McNeely, "House narrowly passes redistricting plan," *AAS*, Aug. 22, 1991; Herbert A. Sample, "House OKs minority district plan," *DTH*, Aug. 22, 1991; Texas Congressional Redistricting Staff, "Narrative of Voting Rights Act Considerations in Affected Districts" (September, 1991), p.2; Eddie Bernice Johnson testimony in *Terrazas* v. *Slagle*, Dec. 12, 1991, pp. 237-38, 242 of Trial Transcript.

[319]Susan B. Glasser, "For Texas Redistricting, It's Make or Break Time," *Roll Call*, May 20, 1991. The district was actually no more safely black than the Frost proposal. Since only 33% of the district's vote went for President Bush in 1988, perhaps 67% might be expected to vote in the Democratic primary. 45/67= .672, while in the Frost plan, 43/60 = .712.

[320]Pauken, "GOP can expect gains in redistricting plan," *DTH*, Feb. 17, 1991.

[321]Susan B. Glasser, "For Texas Redistricting, It's Make or Break Time," *Roll Call*, May 20, 1991. See similarly, Thomas B. Edsall, "Another Candidate for the Endangered Species List: White Democrats," *Washington Post* (National Weekly Edition), June 3-9, 1991, pp. 12-13.

[322]*Terrazas* v. *Slagle*, Dec. 12, 1991 Trial Transcript, p. 246.

The fact that most of the major newspapers covering the Metroplex reported that jockeying by politicians within the black community helped to shape the lines of the 30th District indicates how widespread that view was, if not before the appearance of the articles, then certainly afterwards. *Dallas Morning News*: "While Ms. Johnson will have a hard time cutting many of the commissioner's [i.e., Price's] present southern Dallas County constituents out of the district, she no doubt will try to draw it to include more white precincts in Oak Cliff and Grand Prairie. Such voters would consider Ms. Johnson far more acceptable than the combative Mr. Price."[323] *Ft. Worth Star-Tribune*: "Johnson is expected to draw a district somewhat less dominated by minority residents than Price's precinct."[324] *Austin American-Statesman*: "Ironically, they [Johnson and Frost] are battling not over black Democrats, but over white ones in Grand Prairie and Oak Cliff. Johnson wants the white Democrats in the district because as a moderate Democrat, she fears a challenge from her left if the district becomes too minority-dominated. Frost wants them to be sure he can win the general election against a Republican."[325] *Dallas Times-Herald*: "In the end, however, the choice of a black representative could boil down to which white voters are used to supplement the new district's minority core. If northern Dallas County Republicans are included in the district, black voters would dominate the primary, perhaps helping a more liberal candidate. If Democratic voters in Grand Prairie or Irving are included in the district, the Democratic primary would be split between blacks, Hispanics and whites, assisting a more centrist candidate or enhancing a white candidacy. As one Dallas Democratic strategist put it, 'Go north and help John Wiley. Go west and you help Eddie Bernice.'"[326]

Driving the 30th District west to pick up Anglo Democrats from Frost's 24th and south to try to attain the symbolically important 50% black population goal, which became a popular slogan that no politician could ignore, however meaningless it was in practical electoral terms, had two consequences that largely determined the shape of congressional districts in Dallas and Tarrant counties. First, the borders of the part of the 30th District outside the black population core had to be drawn with some care in order not to take in too many Anglos and Hispanics. In a sense, this had nothing to do with race. To win the 30th District, Johnson needed reliable Anglo Democratic votes from her Senate district, but if she did not produce a district that blacks could indisputably control, she risked losing black voters to John Wiley Price or Texas House member Fred Blair. It was not because Sen. Johnson wanted a segregated constituency or a segregated district that she drew irregular lines on the map, but

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[323]Barta and Bennett, "Sen. Johnson will have big say in drawing new minority district," *DMN*, Jan. 20, 1991.

[324]Kaye Northcott, "New districting lines present many angles," *FWST*, Mar. 17, 1991.

[325]Dave McNeely, "Redistricting mostly pluses for Democrats," *AAS*, April 21, 1991, p. B1.

[326]Richard S. Dunham, "Minority seat may spell peril for 3 congressmen," *DTH*, May 5, 1991.

precisely because she was trying to protect an interracial coalition that would send her, and not another, more radical politician, to Washington. To anonymous critics in the legislature and Congress, it appeared that "her only interest was in creating a district that she could win."[327] Second, the more Democratic voters, black and white, that Johnson took from Frost, the more he had to look for substitutes. Eventually, he found them in Tarrant county, extending the 24th to encompass most of the legislative district of Garfield Thompson (D-Fort Worth), the county's only African-American state legislator. This became part of a complicated three-way swap in which Frost gained black areas from Fort Worth Democratic Congressman Pete Geren, Geren acquired white Democrats from the proposed 30th, and Frost gave up South Dallas black areas to the 30th.[328] The trade made all of the politicians and, arguably, their constituents, better off, and it certainly forwarded the goal of interracial coalitions: The ideological balance of the 24th did not shift so much as to endanger the moderate Frost, who continued to represented a black influence district; the comparatively moderate Johnson[329] got close enough to the magic number of 50% which had the effect of deterring more racially militant challengers; and the more conservative Geren retained enough minority constituents to keep the district from turning Republican, but not enough to encourage Anglo liberal opposition to himself.

3. Republicans and "Fairness"

What made moderate Democrats happy made Republicans apoplectic, and they charged Democrats not with a racial, but with a partisan purpose. "This plan," State House member Kent Grusendorf (R-Arlington) said of the proposal that the House passed, "was drawn with only one thing in mind and

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[327]Kaye Northcott, "Luck of the draw: Senator pushed for new Dallas district to be 50% black population," *FWST*, Dec. 16, 1991.

[328]Kaye Northcott, "House remap gives Frost big chunk of Fort Worth," *FWST*, Aug. 22, 1991; Dave McNeely, "House narrowly passes redistricting plan," *AAS*, Aug. 22, 1991; Herbert A. Sample, "House OKs minority district plan," *DTH*, Aug. 22, 1991; Frank Perkins and James Walker, "Geren says he was blind-sided on changes in district lines," *FWST*, Aug. 23, 1991.

[329]Evidence of Johnson's moderation as a member of Congress comes from the *Congressional Quarterly*'s "conservative coalition" scores mentioned previously. In the 1993 session of Congress, Johnson voted with the conservative coalition 34% of the time, which was quite comparable to the 30% score attained by Dallas liberal John Bryant of the 5th district and the 40% score of Houston "Hispanic district" congressman Gene Green, and much more conservative than the 6% obtained by Craig Washington, the state's only other African-American member. Martin Frost, who had scored 39% and 43% in 1989 and 1990 soared to 56% in 1991, 71% in 1992, and 79% in 1993, apparently "voting his district" each time, but shifting his behavior as the ideological complexion of the voters that he would have to face changed. Frost's shifts as he first anticipated (1991) and then received (1992-93) a more conservative constituency constitute strong testimony on the responsiveness of members of Congress to the voters.

that is to protect Democratic incumbents."[330] One of his colleagues applied the generalization directly to the boundaries of the 30th District: "It has nothing to do with minority representation because if we were really concerned about minority representation, we could have drawn this map in such a way that minorities were considered and not simply to elect Democrats."[331]

Republicans were no more consistent in their dedication to compact shapes and municipal and county boundaries than Democrats were. Thus, they vehemently protested the move to reduce Joe Barton's 6th District from an elongated Dallas-to-Houston district to a more compact Metroplex suburban one. The old 6th, often referred to as "the most gerrymandered district in Texas," had been designed for conservative Democrat Olin Teague during the late 1960s and had survived to become first Phil Gramm's in 1978, and when he left for the Senate in 1984, Joe Barton's. It was the subject of a much-quoted description by State Senators Oscar Mauzy and "Babe" Schwartz that has been more recently misquoted as applying to the North Carolina 12th District: "If you left from the north," Mauzy and Schwartz solemnly pronounced, "and went down Interstate 15 from Dallas in a four-door sedan with all four doors open, and you drove all the way south to Houston, you would kill or seriously maim half the population in the district." Barton, the chief Republican congressional liaison on redistricting, insisted that he should be allowed to keep the district, which contained College Station, much as it was because he was a Texas A&M alumnus and his children were then attending the same university.[332] Nor did Democrats object to the lack of compactness of the 6th District. They just needed to chop parts of it off, as *Houston Chronicle* reporter R.G. Ratcliffe put it, "so they can create a black congressional district in Dallas while maintaining the security of two districts held by liberal Anglo Democrats."[333] Moreover, Republicans, who in 1981 had staunchly favored splitting Corpus Christi along ethnic lines, just as strongly protested when in 1991, Democrats split several West Texas cities in the same manner.[334] Neither party held closely to such principles when partisan or other advantage conflicted with them.

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[330]Kaye Northcott, "House remap gives Frost big chunk of Fort Worth," *FWST*, Aug. 22, 1991. Such statements caused Rep. Grusendorf some difficulties during his testimony in *Vera* v. *Richards*, in which he argued that the only motive of Democratic line-drawers was racial.

[331]Texas House Floor Debate, Transcript from Audiotape 10-B, Aug. 25, 1991, comments of Mr. Hill, pp. 27-31.

[332]Sam Attlesey, "Sprawling U.S. House district," *DMN*, May 1, 1991.

[333]Ratcliffe, "Redistricting becomes the ultimate power play," *HC*, Dec. 23, 1990. Similarly, see Dave McNeely, "Redistricting mostly pluses for Democrats," *AAS*, April 21, 1991, p.B1.

[334]Texas House Floor Debate, Transcript of Audiotapes, Aug. 21, 1991, pp. 136-40.

Indeed, partisan advantage, not surprisingly, best explains the overall differences between congressional redistricting plans offered by Republicans and Democrats. Although Texas has no partisan registration, Republican consultants paid special attention to the patterns in "down-ticket" races such as the Court of Criminal Appeals. Despite substantially less participation, perhaps particularly among minority voters, compared to that in contests for governor, senator, or attorney-general, the votes in these lower visibility races, insiders think, give one the best estimate of the core partisanship of each district.[335] The 1992 results provide considerable support for that view. Candidates from the same political party carried both congressional and Criminal Appeals Court contests in 28 of the 30 congressional districts.[336] In other words, in all but two districts, the Criminal Appeals Court returns accurately predicted the congressional winner.

Democrats carried 21 of the 30 congressional seats in 1992 and their candidate for the Court of Criminal Appeals prevailed in 21, as well. If the votes are reaggregated to determine who would have carried each congressional district in the Criminal Appeals race if other plans had been in effect, every major Democratic plan[337] gives the same number -- 21 Democrats. By contrast, all Republican plans give the Democrats between 15 and 18 seats.[338] Using regression techniques similar to those I employed in Section III, above, an expert witness for the State of Texas in *Vera* v. *Richards* estimated that under the plan proposed by the plaintiffs in that case, Democrats would have carried only 17 seats in 1992.[339] If the 1990 governor's race is taken as an indicator, Democratic plans produce 17 to 19 Democratic victories, while Republican plans range from 13 to 15.[340] The chief difference between Republican and Democratic control of Texas reapportionment, by these measures, was four to six seats in Congress.

In private, where they did not need to posture for the press, Republicans admitted that they did not care much about ethnic minority interests in redistricting. Responding to the Texas Legislative

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[335]Testimony of Jim Duncan, *Terrazas* v. *Slagle* Trial Transcript, Dec. 11, 1991, pp. 60-63, 96-100, 120.

[336]The two exceptions were District 4, where Democrat Ralph Hall is particularly popular, and District 23, where Democrat Albert Bustamante was plagued by scandal.

[337]The major plans were given the following numbers in the legislature's computer system: 500, 505, 525, 551, 552, 574, and 657.

[338]The chief Republican plans were designated 503, 521, 557, and 615.

[339]"Final Report of Allan J. Lichtman," *Vera* v. *Richards*, p.11.

[340]All of these results are calculated from data provided by the Texas Legislative Council. Election data in this form for years before 1992 were available to legislators when they drew and assesed plans during 1991.

Survey, a poll run by University of Texas-Dallas Government Professor Greg Thielemann and funded by three newspapers, most Republican members of the State House ranked "helping minorities" last of their four priorities. On a scale of 1 to 4, with 1 being most important, the average Republican score for "helping minorities" was 3.46. "Helping your party" ranked first at 1.66 for Republicans. (Democratic House members ranked "helping minorities" at 2.06, just behind "protecting yourself" at 2.03 as their most important goal.)[341]

In public, Republicans claimed, as they had a decade earlier, to be the erstwhile best friends of African-Americans and Hispanics, and they appropriated the euphemistic title used by others in 1981, referring to themselves as the "Texas Fair Redistricting Committee."[342] "When you draw minority districts," Gusendorf explained in April, 1991, "you enhance Republicans. Redistricting is a time when Republicans and minorities have a great deal of common interest." Stripped of Gusendorf's euphemisms, the Republican strategy, Dave McNeely of the *Austin American-Statesman* noted, "was to help minority group members pack as many blacks and Hispanics as possible into some inner-city congressional districts -- and to create suburban districts friendly to the GOP."[343] As McNeely suggested and Republican redistricting consultants made explicit, packing the most reliable Democratic voters was most efficient for Republicans if African-Americans and Latinos could be treated as unitary and cohesive.[344] Then, all one had to do was to set and reach some artificial target to create a "minority district," whether it contained enough actual minority voters to elect anyone or not. One Republican consultant even contended that minority candidates would do better in combination minority districts than in black or Hispanic districts alone.[345]

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[341]Stuart Eskenazi, "Redistricting poses problems," *San Antonio Light*, Mar. 121, 1981, p.A-1.

[342]Testimony of Mary Ann Wyatt in *Terrazas* v. *Slagle*, Dec. 10, 1991, p.15. Revealingly, Ms. Wyatt immediately slipped into calling the committee the "Republican Redistricting Committee." p.16.

[343]Dave McNeely, "Redistricting mostly pluses for Democrats," *AAS*, April 21, 1991, p.B1.

[344]This was also the strategy followed by the plaintiffs' expert witness in *Vera* v. *Richards*, Prof. Ronald Weber, in drawing districts at the trial stage. The suit was reportedly largely financed by Republicans.

[345]Henry Flores testimony in *Terrazas* v. *Slagle*, Dec. 11, 1991, pp. 138-165. By combining the percentages of blacks and Hispanics before comparing them to election returns, and by using a small number of unrepresentative elections, Flores rendered his results meaningless. See testimony of Allan Lichtman, Dec. 12, 1991, pp. 251-60.

4. The Houston "Hispanic District"

People in Dallas and Houston knew that minority cohesion could not be so blithely assumed. In 1983, the only Hispanic on the Dallas City Council, Ricardo Medrano, lost a runoff to Paul Fielding, an Anglo, in a district that was approximately a third black, a third Latino, and a third Anglo. Although African-Americans had supported Medrano, a member of a prominent Hispanic political family, in his first election in 1979, black political leaders refused to back him in 1983 because many felt that he had been tardy in taking action to abate pollution from a lead smelting operation and because he refused to pledge to endorse a black for the position in the future. At a press conference after his defeat, Medrano exploded. Progressive Voters League leaders John Wiley Price, Mattie Nash, and Jesse Jones, he charged, "have torn the foundation (of the black-brown coalition) down. Judas got 30 pieces of silver -- they got more than 30. Money, that's always been the bottom line."[346]

Houston in 1991 suffered an even more high-profile example of the breakdown of minority cohesion, as black State House member Sylvester Turner lost a bitter mayoral race to Anglo Bob Lanier. Although ugly personal rumors circulating about Turner may have damaged his campaign, Hispanic support for Lanier was public and overwhelming, and may have cost Turner election as the first African-American mayor of a major Texas city. "We turned out our voters for Lanier in the mayoral election," Lisa Hernandez of Southwest Voter Registration Education Project later boasted.[347]

The first plan presented by Sen. Eddie Bernice Johnson for a "Hispanic congressional district" in Houston made the district only 44% Hispanic in population and excluded the home of the principal Latino on the House Redistricting Committee, Roman Martinez. Widely rumored to covet the seat for himself, Martinez was said to have been furious about Johnson's move. Without naming names, Johnson remarked that the Houston situation was complicated by the fact that some Hispanic leaders wanted to cut the homes of other Hispanics out of the prospective district.[348] That was only a small part of the complexity.

The census of 1990 found 644,935 persons of Hispanic origin in Harris county, a more than sufficient number to form a congressional district of the ideal size for Texas of 566,217. Whether

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[346]Ford Fessenden, "Progressive Voters president says Medrano's job is on line," *DTH*, April 14, 1983; Ester M. Bauer, "Medrano blames black leaders for defeat," *DMN*, April 17, 1983, p. 20-A; Sam Attlesey, "Minorities split on suit for districts," *ibid.*, April 17, 1983, p. 21A; Ford Fessenden, "Voters oust Medrano in runoff," *DTH*, April 17, 1983, p.1A.

[347]Robert Eckels, Testimony in *Terrazas* v. *Slagle*, Dec. 10, 1991, pp. 119-26; Lori Rodriguez, "One Vote, One Voice; Through redistricting and growing voter registration, Hispanics say, a new political age is dawning in Texas," *HC Texas Magazine*, May 3, 1992, p. 10.

[348]R.G. Ratcliffe, "Redistricting plan draws battle lines," *HC*, May 1, 1991.

enough of them could be united without damaging the chances of blacks, who had held the 18th District since 1972, and without alienating surrounding Anglo incumbents was more problematic. Craig Washington's 18th District actually contained more Hispanics, 37% of its voting age population, than blacks, who made up just 34.5%. Extracting the fairly interspersed Hispanic population and adding blacks from three adjacent districts, each of which was about 20% black, would somehow have to be accomplished, everyone assumed, in order to avoid retrogression under the Voting Rights Act.[349] Since only 30-45% of the Hispanics of voting age were then registered to vote in Harris County,[350] and since blacks could hardly be assumed to be certain to back a Latino candidate in a primary, the total population would have to be substantially more than 50% Hispanic in order to assure the Hispanic community of an opportunity to elect a candidate of its choice.

There were essentially two ways to get that population -- go northeast and take it from Republican Jack Fields's 8th District, which would please Democrats and make it impossible to create another suburban Republican district north of Houston, or go southeast and take it from Democrat Mike Andrews's 25th District, which would alienate Democrats. Republicans proposed a plan that gutted Andrews's district to create a seat that was 47% Hispanic and 15% black, and therefore, with approximately equal numbers of black and Hispanic voters, a district of maximum potential interethnic conflict. Andrews's house was carefully placed several miles outside the line of the Republicans' proposed 25th.[351] There was no way to avoid mixing partisanship with the attempt to create a new Hispanic district.

In Houston as in Dallas, the jockeying of potential candidates for advantages combined with partisan factors to affect the shape of the new congressional district. Since the number of State Senators in Texas in 1991, 31, was almost the same as the number of members of Congress, 30, many State Senate districts overlapped considerably with congressional seats and, with experience in running campaigns in large, similar districts, Senators become the natural predators of congressional incumbents. Sen. Gene Green, a labor union-oriented Anglo Democratic state legislator from Houston

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[349]Dave McNeely, "Redistricting mostly pluses for Democrats," *AAS*, April 21, 1991, p.B1. If Hispanics, a large portion of whom were non-citizens or under 18 years old, were extracted from District 18 to build up the Hispanic population of District 29, the black percentage of District 18 would have to be actually raised to avoid retrogression, because blacks would comprise a smaller percentage of the voters in District 18 if Anglos were moved in when Hispanics were moved out. Whether or not the new District 18 needed to have a 51% black population for African-Americans to have a good chance to elect a candidate of their choice is much less clear. Judge Jones's treatment of this issue, *Vera* v. *Richards*, p. 19, which follows the narrative in the state's Section 5 Submission to the Department of Justice, is so simplistic as to be misleading.

[350]These figures are calculated from data supplied by the Texas Legislative Council at the congressional district level for districts partly or wholly lying in Harris County .

[351]R.G. Ratcliffe, "GOP redistricting plan draws wrath of Democratic lawmakers," *HC*, April 30, 1991, p. 21A. The plan produced by Democratic members of Congress left Harris county blank.

for 20 years, was an obvious candidate for the new Houston seat, designated early on as the 29th. In his position as the principal line-drawer for Harris county congressional districts in the State House, Roman Martinez's "chief aim," according to one report, "is to draw a district that would exclude the home of state Sen. Gene Green." Since Green's home was in the northern part of Houston, this consideration tilted Roman Martinez and his mentor, City Councilman Ben Reyes, who was also interested in going to Congress, toward the pro-Republican option of moving the district south to attack Andrews.[352]

Sen. Johnson's redrafted plan, which raised the Hispanic population percentage in the 29th to 56%, was thus not enough to satisfy Rep. Martinez, because Green's home was left in the district.[353] In August, Martinez unveiled a plan that not only excluded Green's house, but also Baytown, which was the home territory of longtime LULAC activist Tony Campos, whose son Marc was supporting Al Luna, a bitter rival of Reyes and Martinez, for Congress. The percentages and shapes seemed to matter less than the personalities. "We've got that thing so close now," commented Democratic State Chairman Bob Slagle, who took an active role in the reapportionment, that "it's just a matter of everybody playing for an angle."[354] Finally, Green and Martinez met and agreed that neither would draw the other, or any other prospective Democratic candidate or even campaign consultant, out of the district. As finally meticulously drawn with help from the Southwest Voter Registration Education Project, which had ironically acquired its redistricting software without cost from the Republican National Committee earlier, when the Republicans were trying to woo minority activists in Texas, the 29th was 60.6% Hispanic and 10.2% black in population, though only 55.4% Hispanic in voting age population and 26.3% in registered voters.[355]

Partisanship, the desire to protect Anglo, as well as black incumbents in adjacent districts, and the personal struggles for power that are an inevitable concomitant of democracy combined with a desire

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[352]Juan R. Palomo, "Is Martinez out to get Andrews?" *HP*, April 30, 1991, p.A-11 (quotation); Alan Bernstein, "Seminar is held on plan to form Hispanic district," *HC*, Feb. 3, 1991, p.3C; Sam Attlesey, "Minorities amass arsenal for redistricting 'war,'" *DMN*, April 15, 1991.

[353]Michael Cinelli, "Hispanic-dominated district nearing reality as talks go on," *HP*, May 15, 1991, p.A-17; Cinelli, "Senate panel OKs new congressional districts for Texas," *ibid.*, May 16, 1991.

[354]Gardner Selby, "Panel excludes Baytown in new 'Hispanic' district," *HP*, Aug. 6, 1991; R.G. Ratcliffe, "Redistricting plan politics is charged," *HC*, Aug. 6, 1991; Ratcliffe, "Drawing outside the lines," *ibid.*, Aug. 19, 1991; Alan Bernstein and Jim Simmon, "Hispanics' eyes on the prize," *ibid.*, Dec. 22, 1991.

[355]R.G. Ratcliffe, "Area Democrats OK pact to form Hispanic congressional district," *HC*, Aug. 24, 1991; Gardner Selby, "GOP loses on congressional redistricting," *HP*, Aug. 15, 1991; Selby, "Architects of new 29th District claim big victory for Hispanics," *ibid.*, Sept. 1, 1991; Alan Bernstein, "Group examines the gap between Hispanics, GOP," *HC*, Feb. 18, 1991, p.11A, c.1. Registration and population statistics from Texas Legislative Council.

to establish an ethnic district to shape its lines. To represent the complex story as if it were wholly determined by ethnicity would be to misunderstand it fundamentally. And as if to prove that the 29th was not a "segregated district," its representative solely dedicated to a single group's undifferentiated interest, three Latinos -- Ben Reyes, Al Luna, and Chief Municipal Judge Sylvia Garcia -- contested the Democratic primary with Gene Green.[356] After two bitter, racially polarized runoffs with Reyes, Green, with a combination of National Rifle Association and labor union financing and backed by a coalition of Anglos, many blacks, and even a few Mexican-Americans, became the congressman from the "Hispanic district."[357] The *Vera* v. *Richards* plaintiffs' version of the district would have cut the Hispanic portion of the voting age population by nearly half, insuring Anglo control for the forseeable future, if it had been adopted.[358]

5. A District of His Own

Hispanic population growth in South Texas was so great that there was little controversy over whether to draw a new district there. Nor was the state about to repeat its 1981 decision to pack one

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[356]When Reyes entered the race for Congress, Ramon Martinez dropped out, deciding instead to contest incumbent Sen. John Whitmire, an Anglo, whose seat, designed by a federal district court, was 57% Hispanic in population. Putting together a coalition of Anglos and blacks, but getting only about 20% of the Latino vote, Whitmire eked out a 52-48% victory in a nastily fought runoff with Martinez. Alan Bernstein, "Hispanic voter group backs Sen. Whitmire; Challenger Martinez claims it's spite," *HC*, Feb. 15, 1992, p.A26; Bob Tutt, "Martinez, Whitmire face Senate runoff; Hard duel in 15th District stays close," *ibid.*, March 11, 1992, p.A25; Bernstein, "Hispanic drive for power is up to 3 candidates with previous ties," *ibid.*, March 12, 1992, p.A14; Paul Burka, "Battle Lines," *Texas Monthly* (March, 1992), pp. 50-56; Lori Rodriguez, "Some gain seen in narrow losses," *ibid.*, April 18, 1992, p.A23.

[357]Alan Bernstein, "Race for new congressional seat begins to gather speed; Democrats Green, Luna nab endorsements," *HC*, Jan. 31, 1992, p.A21; Bernstein, "Hispanic voter group backs Sen. Whitmire; Challenger Martinez claims it's spite," *ibid.*, Feb. 15, 1992, p.A26; Bernstein, "Luna blasts opponents as campaign catches fire," *ibid.*, Feb. 29, 1992, p.A1; Bernstein, "Personalities and populations; 29th District primaries stir Hispanics," *ibid.*, March 1, 1992, p. 1 of "Voter's Guide"; Bernstein, "Green's campaign has plenty of green," *ibid.*, March 4, 1992, p.A16; Bernstein, "29th District poll indicates Reyes, Green head for runoff," *ibid.*, March 5, 1992, p.A1; Bernstein, "Green, Reyes are heading for runoff in 29th District," *ibid.*, March 11, 1992, p.A1; Bernstein, "Reyes' neighborhood is invaded by Green; Late tax payments by councilman hit," *ibid.*, March 27, 1992, p.A.26; Jim Simmon, "Green, Hispanic judges lambaste Reyes," *ibid.*, March 31, 1992, p.A10; Bernstein, Catherine Chriss, James Campbell, "Election '92; Green wins in tight race with Reyes, *ibid.*, April 15, 1992, p.A1; Lisa Teachey, "Green, Reyes swap more heated charges," *ibid.*, July 25, 1992, p.A28; Bernstein, "It's a rerun: Green defeats Reyes again; 51.5% win deals blow to Hispanic activists," *ibid.*, July 29, 1992, p.A1; Bernstein, "Candidates put rush on District 29; Green, Ervin attempt to woo Reyes backers," *ibid.*, July 30, 1992, p.A17.

[358]"Final Report of Allan J. Lichtman," *Vera* v. *Richards*, at 26.

district with Hispanics, while leaving a next-door district with less than a working majority of Latinos, a decision of which the Justice Department and the federal courts in the 1980s had emphatically disapproved. And the presence in the State Senate of an ambitious and popular legislator, Frank Tejeda, made the third minority congressional district in the state, the 28th, noncontroversial.[359] Drawn by and for Tejeda, the 28th provided him with virtually uncontested victories in the primary and general elections.[360]

6. Race-Consciousness and the Process of Redistricting in Texas in 1991

Seemingly recognizing that the legislature was moved by partisan and personal motives, as well as desires to allow African-Americans and Latinos to have equal opportunities with whites to elect candidates of their choice, which could be accomplished in Texas in the 1990s only in substantially minority districts,[361] the plaintiffs in *Vera* v. *Richards* disregarded Justice O'Connor's explicit statements in *Shaw* v. *Reno* and announced the theory that *any* use whatsoever of knowledge about where people of different races lived would render a redistricting unconstitutional.[362] It did not matter what the percentages of minorities in the resulting districts were or whether race was employed merely as a means to some other, non-racial end, such as incumbent protection.[363] Thus, they

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[359]Kemper Diehl, "Congressional redistricting changing the face of Texas," *San Antonio Express*, April 28, 1991.

[360]David Elliot, "Tejeda maps easy road to Congress," *AAS*, March 2, 1992.

[361]Even though plaintiffs and defendants in the case differed on the proportion of minorities necessary in a district to elect a candidate of a particular minority and whether cohesion of Latinos and blacks could be assumed, they implicitly agreed that racial bloc voting by whites would prevent the election of minority candidates unless the proportion of minorities in a district were appreciable.

[362]At points in her contradictory and loose-ended opinion, Judge Jones seemed implicitly to accept the plaintiffs' theory (*Vera* v. *Richards*, *supra*, note xxx, at 1326-28, 1339), but in the end (*id*, at 1344-45), she rejected it because the districts did not appear excessively ugly to her eye and because the racial percentages in the irregularly drawn parts of the district did not constitute a large enough percentage of the total district to matter to her. It is difficult to uncover the principle at work here.

[363]Plaintiffs' Post Trial Brief in *Vera* v. *Richards*, at 1-4. In their legal papers, plaintiffs only held to this theory inconsistently (see, e.g., *id.*, at 5-6; Plaintiffs' Proposed Findings of Fact at 11-12, par. 72), not bothering to pose any other legal theory formally prefaced by such locutions as "In the alternative . . . " and not seeming to notice their striking contradictions. If a court were to accept the theory outlined in the text, then incumbent protection which involved drawing persons of one race in and those of another ethnic group out of a district would not constitute a non-racial explanation of district lines, but a racial one, and there would be no reason to ask a court to reject it, as the plaintiffs did in their Post Trial Brief at 5.

challenged not just the three new majority/minority districts, or even the nine total majority/minority districts, but all thirty districts in the state. In a less-developed, but apparently deeply felt companion theory, the *Vera* plaintiffs attacked any *politically*-conscious redistricting as unconstitutional under *Reynolds* v. *Sims*[364] because it discriminated against voters whose candidates lost.[365]

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[364]377 U.S. 533 (1964). To accept this theory, the Supreme Court would have to reject not only common sense, but the well-established majority opinion of Justice White in *Gaffney* v. *Cummings*, 93 S.Ct. 2321, 2331-32 (1973), that "Politics and political considerations are inseparable from districting and apportionment." No Justice dissented from this part of White's opinion.

[365]It is not clear how seriously this proposal to enable all-powerful courts to "take politics out of redistricting" was meant, and the three-judge panel only flirted with it (*Vera* v. *Richards*, *supra*, n. X, at 1334). Under the plaintiffs' doctrines, any congressional or legislative district that somehow managed to escape challenge as race-conscious would fall to political consciousness, putting all power in the hands of judges. That turning redistricting over to judges may not remove politics is suggested by the experience of *Terrazas* v. *Slagle*, 789 F.Supp. 828 (W.D.Tex. 1991), in which a brazenly partisan former Texas legislator, Judge James Nowlin, was caught allowing his 1981 redistricting buddy, George Pierce, to draw part of the State Senate district in which Pierce subsequently ran. Despite Nowlin's self-righteous avowal that his only purpose was to empower ethnic minorities, his plan only slightly amended a previous Republican arrangement of lines, representatives of minority groups bitterly attacked his scheme, which paired seven Democratic and no Republican incumbents, and the 1992 outcome produced one less Latino and four fewer Democratic Senators than the plan that the legislature had adopted almost certainly would have. The casualties included the Democratic Senate Majority Leader and the Chairman of the Redistricting Committee. After an outcry over Nowlin's provable misdeeds, the Fifth Circuit Court of Appeals appointed a committee that conducted a short investigation and slapped the judge on the wrist. Still, it took more pressure to get Nowlin to recuse himself from the case. See Wayne Slater and Sam Attlesey, "Judges uphold congressional remap plan," *DMN*, Dec. 25, 1991, p.1A; "Federal judges OK congressional remap," *Waco Tribune Herald*, Dec. 25, 1991; "Redistricting Effect Unclear," *Tyler Courier-Times*, Dec. 26, 1991, p.1; Jim Krane, "Court redraws Zaffirini's district," *Laredo Morning Times*, Dec. 27, 1991; R.G. Ratcliffe, "Redistricting draws line in political sand," *HC*, Jan. 6, 1992, p.1A; Ratcliffe, "Democrats see only even odds for voting plan," *ibid.*, Jan. 8, 1992; Ratcliffe, "Democratic redistricting plans OK'd," *ibid.*, Jan. 9, 1992, p.1A; Ratcliffe, "Judges reject state Senate's remapping plan," *ibid.*, Jan. 11, 1992, p.1A; Gardner Selby, "Senate redistricting plan rejected by federal judges," *HP*, Jan. 11, 1992, p.A-1; Dave McNeely, "Redistricting plan drawn by Senate is rejected," *AAS*, Jan. 11, 1992, p.A1; John Gonzalez, "Remap drafts sealed," *Fort Worth Star-Telegram*, Jan. 15, 1992, p.13; Sam Attlesey, "Lawmaker allegedly aided court's clerks in remap," *DMN*, Jan. 15, 1992, p.1A; Kaye Northcott, "Remap accusers called 'desperate,'" *Fort Worth Star-Telegram*, Jan. 16, 1992, p.21; Gardner Selby, "Court rejects Texas's plea to block map's use," *HP*, Jan. 17, 1992, p.A-11; Dave McNeely, "Complaint filed over redistricting," *AAS*, Jan. 21, 1992, p.B1; McNeely, "Morales asks federal judge's aid in Nowlin investigation," *ibid.*, Jan. 29, 1992; Denise Swibold, "records show Pierce phoned redistricting court often," *San Antonio Light*, Feb. 7, 1992, p.A1; Clay Robison, "Redistricting plan may be scrapped," *HC*, Feb. 8, 1992, p.1A; Diana R. Fuentes, "Special judge sought to probe redistricting case," *San Antonio Express*, Feb. 11, 1992; Edward M. Sills, "Redistricting inquiry blocked," *San Antonio Light*, Feb. 11, 1992; Same Attlesey, "Remap plans drawn by judge's clerks, GOP similar, analysis shows," *DMN*, Feb. 2, 1992; Mary Lenz, "Hispanic leader says court's action resulted in loss of state Senate seat," *HP*, May 12, 1992; Dave McNeely, "Findings shed light on Pierce's redistricting role," *AAS*, May 19, 1992; "Senate staffers call for impeachment of redistricting judge," *ibid.*, May 24, 1992; Kaye Northcott, "Nowlin quits seat on panel," *Fort Worth Star-Telegram*, July 23, 1992; Rick Casey, "Nowlin already out, now down as well," *San Antonio Light*, Aug. 30, 1992, p.A1; Rad Salee and Linda Gilchriest, "New district costs 'Dean of Senate'," *HC*, Nov. 5, 1992, p.A1; Alan Bernstein, "County elections

For evidence of racial legislative intent, they merely compared ethnic and district maps and calculated ethnic percentages of split counties and Voter Tabulation Districts ("VTDs"). Unless the ethnic percentages in parts of counties or VTDs in different congressional districts were exactly the same, the plaintiffs, ignoring geography entirely, inferred that they were intentionally split on racial lines.[366] Falsely denying that any evidence of past discrimination in redistricting had been presented by the various parties defendant,[367] they nowhere contradicted other explanations of the demographic and geographic composition of districts, but merely ignored them. "[T]he overriding factor in the construction of the Congressional Plan [*sic*] was the use of race to separate the residents of Texas by race and the assignment of those persons of common race to common districts."[368]

In fact, evidence brought out during the *Vera* litigation undermines the plaintiffs' and judges' maps' eye view that the process of redistricting had one pervasive purpose.[369] It reveals, first, the decentralization that allowed incumbents and influential prospective candidates to shape their districts and therefore to maximize their election or reelection probabilities free of most top-down constraints; second, the degree to which facts about partisan and racial geographic concentrations could be used interchangeably as predictors of electoral behavior; third, the extent to which elected officials wanted their districts to include (or, sometimes, to exclude) voters whom they had represented or had contact

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followed grand design," *HC*, Nov. 8, 1992, p.2; Henry A. Politz *et al.*, "*In Re*: The complaint of Lewis H. Earl against United States District Judge James R. Nowlin under the Judicial Conduct and Disability Act of 1980," (mimeo., May 15, 1992).

[366]Plaintiffs' Proposed Findings of Fact, *Vera* v. *Richards*, at 4-10, pars. 24-45, 58. To take perhaps the most egregious example, plaintiffs inferred a racial intent in the split of Johnson County because the part in Congressional District 6 was 7.8% black and Hispanic; whereas that in District 12 was 11.3%. How the racial balancing needed to get the percentages to come out approximately equal could be accomplished without race-conscious design, the plaintiffs did not explain.

In a larger sense, the plaintiffs and Judge Jones (*Vera* v. *Richards*, pp. 46-51) ignored the submergence of minority voters in overwhelmingly conservative Anglo districts that would often result if municipal or county boundaries were held sacrosanct during redistricting. As I have argued elsewhere, a refusal to recognize the concept of influence districts makes the rights of a minority individual depend on the percentage of her group in an arbitrarily defined area, and insures that those voters least likely to be able to protect themselves (because they comprise a smaller percentage of the voting population) receive the least protection from the courts. See Kousser, "Beyond *Gingles*: Influence Districts and the Pragmatic Tradition in Voting Rights Law," 27 U.S.F.L.R. 551 (1993).

[367]Plaintiffs' Post Trial Brief, *Vera* v. *Richards*, at 18.

[368]Plaintiffs [*sic*] Proposed Conclusions of Law, at 3, par. 8.

[369]Lawyers and judges sometimes give considerable deference to sworn evidence taken during litigation, but deride newspaper articles as "hearsay." In both the North Carolina and Texas cases, each type of evidence, viewed, as historians are wont, with a critical eye, strongly reinforces the other.

with before, characteristics that were often more important to the politicians than the ethnicity, class, or party of voters who might be included in their districts; and fourth, the importance that arbitrary numbers -- 50%, 60%, 65%, 80% -- took on, goals that forced those actually drawing the lines to increase the irregularity of districts for reasons that only appeared to be concerned with race or ethnicity.

Asked during her deposition what her involvement was in drawing District 18 in Houston, Eddie Bernice Johnson, chair of the State Senate subcommittee on congressional redistricting in 1991, replied "None." She put Sen. Gene Green in charge of arranging districts for Harris county and Sen. Frank Tejeda in charge of those in South Texas.[370] The correlation between which Senators had charge of drawing each new congressional district and the ultimate victors in those districts was exact.[371] Questioned as to why a line was marked at a particular place in Brazos county, Johnson responded: "Frankly I don't know, because on this part of the plan the incumbents did most of the architecture."[372] "Incumbents," she remarked later, "came in and worked the parts of the map that they desired and if it worked in the total picture that's what we did. We basically attempted to satisfy these incumbents."[373] Nor were only Democratic incumbents accommodated, she claimed. "Q. Are you telling me now that what drove this was a friendly bipartisan incumbent protection plan? A. Exactly. . . . I was open to everyone who came to see me and it was not all [D]emocratic influence in this plan. Q. It was bipartisan, there was no attempt to prefer and maximize the [D]emocratic representation? A. It was an effort to protect those incumbents because there was no way I could survive without doing it in this process."[374]

Legislative redistricting technician Christopher Sharman, who observed and helped craft many of the details of the maps as he sat at a computer terminal and assisted elected officials and their staff members in drawing districts, reflected the same view. "Q. In the districting process overall for Congress, were there people who had more regional interest versus being involved in the whole districting map? A. There were very few people that were involved in the whole districting map. It

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[370]Eddie Bernice Johnson Deposition Transcript, *Vera* v. *Richards* (hereinafter referred to as "Johnson Depo.", June 13, 1994, pp. 47-48.

[371]In the 1992 primary in her overwhelmingly Democratic 30th District, Johnson's only opponent was the black owner of a tamale restaurant, who had never held elective office and who was able to raise little money. Robert V. Camuto, "Senator's role in mapping hot issue in Dallas race," *FWST*, Feb. 11, 1992.

[372]Johnson Depo., pp. 74-75.

[373]Johnson Depo., p. 101.

[374]Johnson Depo., p. 121.

mostly was regional. . . . Dallas/Fort Worth was a region; Harris County was a region; the [Rio Grande] Valley was a region; Bexar County was a region. Q. What about East Texas? A. East Texas was certainly a region, yeah."[375] Although El Paso Congressman Ron Coleman was designated by the Democrats in the delegation as their liaison on redistricting with the legislature, Coleman and his staffer Paul Rogers, according to Sharman, "just kind of observed the process and tried to play mediator for certain conflicts."[376] Unlike Speakers Mutscher and Clayton or Lt. Governors Barnes and Hobby in 1971 and 1981, Lt. Gov. Bob Bullock was only a mediator in 1991, and House Speaker Gib Lewis's principal role was to throw "a wrench, so to speak, into the works" at the last moment because of a parochial concern with his hometown, Fort Worth.[377] Strikingly unlike Gov. Bill Clements in 1981, Gov. Ann Richards barely rates any mention at all in connection with congressional redistricting in 1991.[378] Although individual Republican congressmen directly or indirectly made their wishes known to the Democrats who were in charge of redistricting, and although the party, through its "Fair Redistricting Committee," produced a comprehensive plan, there is no mention in the newspapers or depositions of comprehensive negotiations between leaders of the two parties. Such high-level interparty negotiations, had they taken place, would have been another means of providing authoritative control.

The combination of a lack of overall direction and the necessity to satisfy incumbents of both parties[379] produced both bitter conflicts and the resolution of those conflicts by drawing irregular lines. The fact that this happened in areas containing few minorities, as well as many minorities suggests that the irregularities reflected the particular interests of politicians more than they did racial interests. Sharman described a meeting in Lt. Gov. Bob Bullock's office on Sunday, apparently Aug. 20, 1991, at which staffers presented a tentative map to Congressmen Mike Andrews, John Bryant, Jim Chapman, Chet Edwards, Martin Frost, "Kika" De La Garza, Pete Geren, Ralph Hall, Greg Laughlin, Solomon Ortiz, Bill Sarpalius, and Charles Wilson -- twelve of the nineteen Democratic incumbents. There were "numerous conflicts that arose when they saw what their districts actually looked like, and

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[375]Christopher Martin Sharman Deposition Transcript, *Vera* v. *Richards* (hereinafter Sharman Depo.), June 18, 1994, pp. 83-84.

[376]Sharman Depo., pp.104-05.

[377]Sharman Depo., pp. 82, 116. Sharman's account is butressed in Richard S. Dunham, "Johnson wins big for blacks," *DTH*, Sept. 1, 1991, p. A1.

[378]Only in the final negotiations did Richards threaten to veto any plan that paired Congressmen Bryant and Frost. Richard S. Dunham, "Johnson wins big for blacks," *DTH*, Sept. 1, 1991, p. A1.

[379]Sharman Depo., pp.193-95.

then the process went on from there." Bullock "basically went congress member by congress member asking them what it was that they needed changed with their districts in order to be happy."[380] A typical example was in East Texas. Congressman Charlie Wilson in the Second District managed to rid himself of those parts of Nacogdoches county that had voted against him, which produced a ripple effect in Congressman Jim Chapman's First District. Since Chapman did not want Smith county, where he had not been successful in the past, and Congressman Ralph Hall did not want to give up what was for him good territory in Hunt county, Gregg county ended up being split.[381] One of the several splits in Denton county came because a minor newspaper editor "just hated Congressman Hall and wrote very nasty things about him," and Hall wanted to jettison the editor's community.[382] Cong. Jim Sarpalius didn't want to give up an airport in Lubbock, while Eddie Bernice Johnson wanted her district to include DFW International.[383] Other seemingly anomalous extensions to Johnson's district were the results of her desires to pick up areas where she could raise campaign funds from Jewish voters and from middle-class blacks who had moved far out of central Dallas, and her effort to include an overwhelmingly white, but liberal area in Grand Prairie that had provided her margin of victory -- over a black opponent -- in the 1986 State Senate race.[384] In San Antonio, Democrat Albert Bustamante and Republican Lamar Smith insisted on having areas containing their houses included in their districts, and Smith was pleased to have communities where key campaign contributors lived within his district's perimeters.[385] Having sponsored the armed forces base closing bill, Republican Dick Armey received so much opposition when the Carswell Air Force Base in Tarrant county was slated for closure that he moved his home from Tarrant to Denton county and made sure that his new 26th congressional district excluded as much of Tarrant as he could manage.

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[380]Sharman Depo., pp. 106-09.

[381]Sharman Depo., pp. 116-20. Sharman's account is confirmed in "Gregg Split," *Longview News-Journal*, Aug. 27, 1991.

[382]Sharman Depo., p. 126.

[383]Sharman Depo., pp. 124-25, 53.

[384]Sharman Depo, p.53; Johnson Depo, pp.136-41, 162-65.

[385]Sharman Depo., 181-84. There is a similar report in Edward M. Sills, "Redistricting plan OK'd by House," *San Antonio Light*, Aug. 8, 1991, p.B1.

"'He's getting as far away from Carswell as possible,' said state Rep. Jim Horn, R-Denton."[386] In overwhelmingly Hispanic South Texas, splits or proposed splits in Harlingen and Kingsville involved a prospective 1994 contest between Congressman Solomon Ortiz of Corpus Christi and State Sen. Eddie Lucio, Jr., of Brownsville, both Democrats and both Hispanics. Lucio told the *Harlingen Valley Morning Star* that Ortiz's 27th congressional district was being shaped "'to ensure Solomon gets elected time and time again.'"[387]

Naturally, in more ethnically mixed areas, ethnicity was used by both Democrats and Republicans as an index of voting behavior. The principal dividing line in Texas society since the days of the Republic, race could hardly be ignored in politics. As Teel Bivins, R-Amarillo, the chief Republican spokesman on redistricting in the Senate, put it: "We started first with minority communities in the state and tried to draw every minority district that we could. Now I will be the first to admit to you, as I've stated on this floor previously, that when you take that approach and you create the ability for minorities to elect one of their own, that there is clearly an indirect benefit to Republicans who are going to seek to run in other districts. . . "[388] Republicans were at least as self-conscious about using racial and ethnic characteristics to help their party and their incumbents as Democrats were. It was just, as Bivins's statement clearly sets out, that Republicans wanted to pack minorities and make sure that there were too few minority voters outside the packed districts to elect Anglo Democrats; whereas, Democrats, as the depositions of Johnson and Sharman reaffirm,[389] wanted to include enough reliably Democratic minorities in their districts to protect them from Republicans.

But the same depositions underline the fact that even in Dallas and Houston, race was not the only index, and that if it had not been available, proxies would have been nearly as efficient in spotting voters useful to incumbents and other prospective candidates. To determine which voters fit her conception of the 30th District, Sen. Johnson used referenda on rapid transit and school bonds, as well

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[386]Johnson Depo., p. 151; Jim Fredricks, "House plan splits Denton," *Denton Record Chronicle*, Aug. 8, 1991, p.1A. The home of a Republican legislator who was a possible opponent of Armey conveniently ended up in another district. Jim Davis, "Bad gerrymandering," *Plano Star Courier*, Aug. 28, 1991, at 1A.

[387]Rickey Dailey, "Redistricting may divide Harlingen," *Harlingen Valley Morning Star*, July 17, 1991, p.A1; Scott Stanford, "Redistricting involved behind-the-scenes intrigue," *Kingsville Record*, Aug. 21, 1991. A State Senate plan approved in a compromise settlement by a state court, which was adverse to the conservative Lucio, was eventually overturned by a three-judge federal court, which substituted the "Nowlin plan," one much less favorable to Lucio's liberal Hispanic opponents. James Pinkerton, "New plan redraws all 31 Senate districts," *HC*, Oct. 8, 1991, p. 13A; Cindy Tumiel, "Redistricting struggle heats up in the Valley," *Corpus Christi Caller-Times*, Oct. 22, 1991; John Weimer, "Lucio, Hinojosa at odds over latest proposal," *McAllen Monitor*, Dec. 27, 1991; Rickey Dailey, "Lucio says calls to judge's office simply inquiries," *Harlingen Valley Morning Star*, Feb. 28, 1992, p.A1.

[388]Transcript, Texas Senate Committee of the Whole, Aug. 24, 1991, Tape 2, p.5.

[389]Johnson Depo., 117-20; Sharman Depo., 78.

as race, other election returns, and personal observations. "[W]hat we also looked at is voting patterns and voting patterns were just as easy to get [on the legislature's "Red Apple" computer system] as ethnic background . . . " Frost and Bryant, she said, did not ask to have minority voters per se put into their districts, but they did ask for Democrats. "They were fighting over those blue voters [Democrats, in Red Apple's code]. They wanted blue voters, the voting patterns that showed up blue on the computer screen. . . . Traditionally minority voters vote [D]emocrat overwhelmingly, 97, 98, 99%, so when you're looking for [D]emocrats you're looking virtually for the same population."[390]

Nor did Johnson want every black. Chris Sharman's deposition confirms newspaper reports that Johnson wanted to avoid African-American areas in Dallas that might support County Commissioner John Wiley Price, and adds the information that Johnson wanted to avoid Duncanville because it was the territory of Royce West, a prominent black lawyer who had run a high visibility campaign for district attorney a few years earlier, and who was another potential candidate for Congress against her.[391] And Johnson also wanted to avoid a black area north of downtown Dallas because she knew (not from the census, but presumably from personal observation) that it was filled with non-citizen, transient, non-political Haitian apartment dwellers.[392] As this example emphasizes, even if there were no detailed census, politicians would still be able to rely on their own rough knowledge of the sociopolitical traits of various areas to tailor districts for themselves.

Just as Johnson picked and chose among both blacks and whites, Bryant and Frost and, in Houston, Green and Martinez did not cast their ethnic nets blindly. Politics was the end, and race not always the means. More than just raising their black percentages, Bryant and Frost, according to Johnson, "mostly wanted people they had represented before that they thought would be familiar with their name."[393] Sharman's instructions in building District 30 were to find Democrats, especially black Democrats, "that were not old constituents of" Frost or Bryant, because the congressmen were "very interested" in keeping people who knew them.[394] Gene Green, who had long represented heavily Latino Baytown and Hispanic areas north of downtown Houston, wanted them in the 29th

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[390]Johnson Depo., pp. 85-86, 117, 144.

[391]Sharman Depo, pp. 59-60. Lawrence E. Young, "GOP, blacks assail congressional map," *DMN*, Aug. 9, 1991, p.1A mentions West as a potential congressional candidate in district 30.

[392]Sharman Depo., pp. 79-80. Newspapers reported the general nature of this dispute. Sam Attlesey, "House approves minority congressional seat in Dallas," *DMN*, Aug. 8, 1991, p.1A.

[393]Johnson Depo., pp. 82, 146. Quote from p. 146.

[394]Sharman Depo, pp. 51, 55, 60-63.

congressional district, and for the same reason, Roman Martinez did not.[395] As Sharman put it, "Roman Martinez was trying to include Hispanics that lived in the southern end of the county that had never been represented by Gene Green, didn't know who Gene Green was."[396] And while Green favored including in the 29th district the middle class black area of Pleasantville that he represented in the State Senate, as well as parts of Houston dominated by Central Americans, Martinez, who disagreed, won out.[397] On the other hand, Martinez asked to include his whole State House district within the 29th, in spite of the fact that 10% of its population was black, and he pushed to take in areas, whatever their ethnic percentages, that previous elections had proven to be "not racially polarized" against Latinos.[398]

A detailed examination of the process also emphasizes the importance of arbitrary percentages in determining boundaries. Black leaders in Dallas insisted on a district that was 50% black in population and loudly threatened to protest to the Justice Department and to sue if a district that was 47% black was approved.[399] Roman Martinez agreed that Gene Green could draw his house, which was in a majority-Anglo area, into the 29th district only if the Hispanic percentage remained over 60%, which probably not coincidentally was the same percentage as Martinez's State House district. The only way to include Green's neighborhood and keep the Latino percentage over that symbolic threshold was to divide a great many voter tabulation districts.[400] Republican Teel Bivins predicted

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[395]Roman Martinez Deposition Transcript, *Vera* v. *Richards*, 3 vols. (hereinafter Martinez Depo.), I, 33-34; II, 16, 36-37; III, 17.

[396]Sharman Depo., pp. 160-61.

[397]Gardner Selby, "Lawmakers closer on Hispanic district," *HP*, Aug. 20, 1991; Selby, "State to fight redistricting plans' rejection," *ibid.*, Aug. 24, 1991, p.A23, c.1; Dave McNeely, "Senator says city disputes may doom redistricting bill," *AAS*, Aug. 12, 1991.

[398]Sharman Depo., p. 169; Martinez Depo., II, 36-37.

[399]Sam Attlesey, "House approves minority congressional seat in Dallas," *DMN*, Aug. 8, 1991, p.1A; Lawrence E. Young, "GOP, blacks assail congressional map," *ibid.*, Aug. 9, 1991, p.1A; Sam Attlesey and Christy Hoppe, "Legislature to begin 2nd special session," *ibid.*, Aug. 19, 1991, p.13A; Dave McNeely, "Second special session geared to fast finish," *AAS*, Aug. 20, 1991, p.B1; Mary Alice Robbins, "Redistricting panel OKs splitting cities into 2 districts," *Amarillo News*, Aug. 20, 1991; Gardner Selby, "House approves congressional redistrict plan," *HP*, Aug. 22, 1991; Herbert A. Sample, "House OKs minority district plan," *DTH*, Aug. 22, 1991; Sam Attlesey, "House OKs redistrict plan despite GOP complaints," *DMN*, Aug. 22, 1991; Fred Blair, in Transcript of Texas House Floor Debate, Aug. 21, 1991, pp. 39-42; Richard S. Dunham, "Johnson wins big for blacks," *DTH*, Sept. 1, 1991, p. A1.

[400]Martinez Depo., I, 28-31.

that the Justice Department and federal judges would prefer his plan over that adopted by the legislature because the GOP plan contained a district that was 65% combined minority, failing to note that the 40% of the district that was Hispanic shrank to 25.6% of the voting age population and only 11.1% of the registered voters. Despite reaching the magic number of 65%, Sen. Johnson noted, the Bivins plan only constructed another influence district.[401] And late in the process of redistricting, Cong. Pete Geren insisted that 80% of the population in his district be located in Tarrant county, which caused ripple effects in adjacent districts and county splits in rural counties close to the Metroplex. Geren, according to Sharman, wanted his district to encompass "[R]epublican and suburban . . . areas that he felt he would run better in or would do better in than most [D]emocrats."[402] In other words, the conservative Geren, who had replaced the much more liberal Jim Wright, wished to design his district to protect himself from a liberal challenge in a Democratic primary.

All these details give substance to the generalizations of Dave McNeely of the *Austin American-Statesman*, who had closely attended the redistricting story:

> Drawing those new districts, while still seeking to protect Democratic incumbents like Martin Frost and John Bryant, who have enjoyed strong support from minorities, has brought some awesomely illogical district lines. . . .
>
> The districts they have drawn are largely at the behest of the 19 incumbent Democrats in Congress, with new minority districts in Houston, Dallas and San Antonio.
>
> The Democratic incumbents also seek to lop off unwanted territory that is infested with Republicans, and give it to Texas' eight Republican congressmen.
>
> While some of the Republican congressmen complain about that, most are privately happy, because it means their districts become so Republican that they are in no danger from pesky Democrats. And under the current Republican ethic, Republican incumbents are almost always left free of serious challenge in the GOP primary.[403]

Republican editorialists agreed. Decrying the bifurcation -- along county lines -- of Amarillo, the *Amarillo Daily News* declared that "the only people of Texas who will truly benefit from this plan appear to be the two incumbent congressmen. The redrawn districts gives [sic] [Larry] Combest [R-Lubbock] the part of Amarillo that is considered a Republican stronghold, while [Bill] Sarpalius

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[401]Transcript, Texas Senate Committee of the Whole, Aug. 24, 1991, Tape 2, pp. 3, 9-11; statistics from Texas Legislative Council.

[402]Sharman Depo., 86-90.

[403]Dave McNeely, "A salute to Elbridge Gerry," *Austin American-Statesman*, Aug. 15, 1991.

[D-Amarillo] gets areas that are more entrenched with Democratic voters."[404] The cities were split, according to Delwin Jones, R-Lubbock, vice-chair of the State House Redistricting Committee, because "'Sarpalius [is] hunting for every Democratic vote he can find.'"[405] Even the *Wall Street Journal*, decrying the shape of the 30th District, admitted that "It would have been easy to draw rational minority districts, but then several white Democratic incumbents would have been in political jeopardy with the loss of minority voters."[406]

Although the legislative leaders on redistricting did not broadcast the messy details in public, they did quite forthrightly represent the results of those often idiosyncratic boundaries and the process that produced them. Addressing the House on the day that the almost-final plan passed, Redistricting Committee chair Tom Uher (D-Bay City) remarked that "Because of the flexibility that we had due to the fact that we had three additional seats, we were able to try to design districts that would recognize each incumbent and how that incumbent might be able to win in a district, having a reasonable chance to win in that district. In each of the new districts, we attempted to draw districts that would permit certain candidates who wanted to run to be elected from those new districts."[407] Disagreeing on the bipartisanship, but not the essentially non-racial nature of the process and results, Republican Kent Grusendorf of Arlington concluded that ". . . these lines are very logical and very rational. The lines have been drawn, dissecting communities very creatively in order to pack Republicans and maximize Democratic representation. . . . This plan was drawn with *only* one thing in mind, and that is to protect Democratic incumbents, *period*."[408] His colleague Fred Hill, R-Richardson, specifically denounced the final plan for placing African-American districts in southern Dallas county in District 24 "*simply for the single purpose* of assuring his re-election because those are Democrat voters. . . . It has *nothing* to do with minority representation because if we were really concerned about minority representation, we would have drawn this map in such a way that minorities were considered and not *simply* to elect Democrats."[409]

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[404]"Gerrymandered plan protects incumbents," *Amarillo Daily News*, Aug. 7, 1991, p.4A, c.1.

[405]Philip Parker, "Legislature OKs plan that splits Panhandle, city," *Amarillo News*, Aug. 26, 1991, p.1A.

[406]Editorial, "Monster Map," *Wall Street Journal*, Oct. 18, 1991.

[407]Transcript, Texas House Floor Debate, Aug. 21, 1991, pp. 141-42.

[408]*Ibid.*, pp. 190, 195. Italics added.

[409]Transcription of Texas House Floor Debate, Aug. 25, 1991, Tape 10-B, pp.27-31. Italics added. "Overall," announced the press secretary to Rep. Joe Barton, the congressional liason on redistricting for Texas Republicans, "the redistricting plan passed by the Legislature was designed to protect Democratic incumbents." Robert Hough,

7. *Only* Race?

Was race the *only* reason for drawing Texas's congressional district lines the way they were drawn in 1991, particularly in Dallas, Tarrant, and Harris counties, as O'Connor repeatedly stated was necessary for a constitutional violation under *Shaw* v. *Reno*? While no one doubts that the redistricting was race-conscious and that race played a role in fashioning the boundaries, no one who has reviewed the evidence laid out in considerable detail in Section IV. of this paper can reasonably conclude that race was the *sole* factor in shaping those districts.

It would have been possible to draw districts that scored higher on an index of compactness if legislators had not desired to enable African-Americans and Latinos to have an opportunity to elect candidates of their choice, as the solons thought the Voting Rights Act, the Constitution, and for some, their consciences required. (Of course, had partisan, personal, and incumbent-protecting considerations somehow been ignored, it would have been possible to draw much more compact majority-minority districts.) Not to have drawn majority-minority districts would have risked having the Justice Department refuse to preclear the plan under the Voting Rights Act; what federal courts had condemned as the discriminatory records of the 1971 and 1981 legislatures could have been counted against the 1991 legislature in a constitutional challenge based on discriminatory intent; and many legislators stated, and some no doubt genuinely believed, that to establish such districts was simply the right thing to do.

It would have been possible to sketch boundaries that looked "prettier" on a flat, featureless map if legislators had not been concerned to protect incumbents Frost and Bryant in the north and Andrews and Washington in the south. As all the previous reapportionments, and particularly that of 1981 demonstrate, legislators always pay close attention to the effect of redistricting on the fortunes of incumbents.

It would have been possible to draw districts with shorter perimeters and with much less controversy if legislators with power over redistricting, Senators Eddie Bernice Johnson and Gene Green and Rep. Roman Martinez, hadn't been concerned to guard themselves against rivals, often rivals from their own ethnic group. District lines in America have always reflected struggles for power, in Texas as elsewhere, as the 1971 redistricting starkly illustrates. Should anyone be surprised that minority politicians do not act very differently from majority politicians, that they follow the same real -- not cosmetic and rhetorical -- "traditional districting principles" as everyone else?

It would have been possible to avoid much heated controversy and many lawsuits if there had been no question of partisan or ideological advantage connected with the establishment of majority-minority districts in 1981 and 1991. Republicans and conservative Democrats wanted to pack undifferentiated minorities into central city districts in order to replace liberal and moderate Anglo Democrats with people with whom they were more ideologically compatible. The targeted Democrats

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"County moved to new district in state plan," *Corsicana Daily Sun*, Aug. 29, 1991.

wanted to retain their seats at the expense of conservatives if possible, but at the expense of minority candidates if necessary. Many of the irregularities in district lines were the consequences of efforts to produce certain outcomes not in the majority-minority districts, but in the adjacent districts where African-Americans or Latinos were distinctly in the minority.

It is conceivable that there are instances in which a desire to create a district for one racial or ethnic group is the only explanation for the shape of legislative boundaries. The evidence shows conclusively that Texas in 1991 is not such an instance.

V. RESTORING REALITY TO REDISTRICTING LITIGATION

The redistricting process of the 1990s, the fairest to ethnic minorities in the history of the United States, resulted in the largest increase ever in minority representation in Congress.[410] At the local, as well as the federal level, only the constraints of the Voting Rights Act have allowed the growth of representation by men and women who are the first preferences of the vast majority of African-American and Latino voters.[411] *Shaw* v. *Reno*, at least as interpreted by some commentators, plaintiffs, and judges, threatens to reverse those gains, returning discrete and insular minorities to a condition of blatant inequality with whites, a condition in which whites can easily elect their first choices, but blacks and browns cannot unless they happen to be arranged in geographic patterns that seem attractive to judges. This utterly vague "standard" of "aesthetic correctness,"[412] nowhere mentioned or fairly derived from specific phrases in the Constitution and clearly contradicting seemingly settled federal law and precedent, is separate and unequal, both in the present and in contrast to the past: If implemented as in *Vera* v. *Richards*, it would allow any amount of geographic manipulation of majority-white districts, while condemning minority opportunity districts that are as or more compact by some numerical measure;[413] and as Sections III and IV above extensively

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[410]The number of African-American members of Congress rose from 28 to 40 (counting the delegate from Washington, D.C., and the sole black Republican, who represents a heavily white district); of Latinos, from 9 to 14.

[411]Davidson and Grofman, eds., *Quiet Revolution in the South, passim.*

[412]The phrase is due to Lani Guinier, "Analysis: Lessons of 'History,'" *Voting Rights Review* (Fall, 1993), at 3.

[413]In Texas, the 88% white 6th District, with a "dispersion" compactness score of 0.21 and a "perimeter" compactness score of 0.02 -- higher scores are more compact -- was not ruled unconstitutional by the *Vera* v. *Richards* opinion. The 30th district, 50% black, was struck down despite equal or higher compactness scores -- 0.24 and 0.02, respectively. See Pildes and Niemi, *supra*, n. XXX, at Table 3, p. 183.

document, such a standard has never previously been followed in North Carolina or Texas[414]. Moreover, in contrast to the requirements in minority vote dilution cases, whites in cases that follow *Shaw* v. *Reno* are exempt from proving discriminatory effects --another sense in which *Shaw* marks a return to separate but unequal. And if recently elected black and Latino members of Congress are deleted from the 87% white Congress as a result of *Shaw*, Congress and public life in general will literally become more segregated -- exactly the shibboleth with which Justice O'Connor assaulted the "segregated" (57% black) districts in North Carolina.

The irony of using weapons forged in the First Reconstruction to crush the Second adds stigmatic insult to concrete injury. The Reconstruction Amendments were primarily intended to protect former slaves, free persons of color, and their descendants from discrimination *against* them.[415] Their framers, as veterans of an extended and often desperate campaign against racial slavery and for civil rights, knew that racial discrimination was not easily erased.[416] Slavery existed for 250 years in North America; freedom, so far, has lasted about half that long. The Amendments could not have been meant to facilitate -- not just allow, as in *Plessy* v. *Ferguson*, but reestablish -- a separate but unequal standard, but that is precisely the effect of *Shaw* v. *Reno*. For courts to institutionalize unequal justice under law in the guise of "color blindness" not only perverts the intentions of the framers, it turns them upside down. Some commentators and judges purport to be color blind when, in fact, all they can see is white.[417]

Fortunately, the Supreme Court can still avoid such a broadside attack on the political rights of minority voters. *Shaw*'s many ambiguities and its preliminary nature allow five ways out that do not require an embarrassing scuttling of the opinion. First, the Court could rule that Anglos have to bear the same burden of proof of a discriminatory effect that minorities do in vote dilution or redistricting cases. In the leading lower federal court case on anti-minority redistricting, *Garza* v. *Los*

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[414]State-by-state chapters of Davidson and Grofman, *Quiet Revolution in the South*, demonstrate that North Carolina and Texas were typical of southern states in this regard.

[415]It is instructive to note, for instance, that the index to the 1866 hearings on the Freedman's Bureau Bill conducted by the Joint Committee on Reconstruction, the Committee that framed the Fourteenth Amendment in the same year, contains two pages of entries under the heading "Freedmen, evidence of general hostility and occasional cruelty towards." Jacobus tenBroek, *Equal Under Law* (New York: Collier Books, 1965), at 203.

[416]See the speech of Rep. Thaddeus Stevens, just prior to passage of the Fourteenth Amendment by the House of Representatives, quoted in Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* (New York: Harper and Row, 1988), at 254-55.

[417]Abigail Thernstrom, "Redistricting, in Black and White," *New York Times* (Dec. 7, 1994), at p. A19, c.2. In contrast to Dr. Thernstrom's rosy picture of race relations, the facts are that only two African-Americans (Andrew Young and Harold Ford) have ever been elected to Congress from the ex-Confederate South from majority-Anglo districts, southern Republicans in Congress vote almost unanimously against the views of any black constituents who may be wasted in their districts, and, as Section III.A.1, above, shows, white Democratic members of Congress from the South seldom closely reflect the preferences of their black constituents.

Angeles County Board of Supervisors,[418] a case that the Supreme Court declined to review, both district and circuit courts ruled that even when plaintiffs proved that a line had been drawn partly because of a racially discriminatory intent, minorities still had to make some showing of a racially discriminatory effect. Since no Latino had been elected to the five-member Board since 1874, despite the fact that the population of Los Angeles county in 1990 was 37% Latino, it was not difficult to demonstrate such an effect.[419] For the Supreme Court to fail to apply a similar standard in *Shaw*-type cases would be in itself patently unequal.[420] Second, the Court could determine that the alleged consequences of "racial gerrymandering" -- incorrectly treating minority voters as if they shared interests, increasing racial bloc voting, and electing unusually racially parochial representatives[421] -- turn out in fact not to follow from race-conscious redistricting.[422] Alternatively, the Court might remand the cases, or some of them, back to the lower courts for more evidence on this matter.

Third, the Supreme Court could rule that it meant what Justice O'Connor said when she repeated again and again that race had to be the *sole* reason for the shape of the districts, and that evidence presented to the lower courts convincingly refuted that contention. In particular, it could affirm that it was not the decisions to take race into account or to draw minority opportunity districts *per se* that potentially infringed the Constitution, but the decision to draw the lines in a particular fashion.[423] It could then turn to a question that O'Connor did not squarely address in *Shaw* -- whether a redistricting plan amounted to a "racial classification" if partisan politics or such other motives as preserving communities of interest played an important role in shaping the precise lines in the minority opportunity districts, as they clearly did in North Carolina and Texas. Nothing in the majority opinion in *Shaw* v. *Reno* prevents the Court from ruling that a set of districts whose lines are

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[418]*Supra*, note XXX.

[419]The natural baseline for such an effect is, as *Johnson* v. *DeGrandy* and *Holder* v. *Hall*, *supra*, n. XX, point out, is jurisdiction-wide proportionality. In none of the southern states are Anglos currently represented in Congress in less than their proportion in the population.

[420]In *Garza*, the district and circuit courts did not merely rely on a comparison of district lines with ethnic maps, but supplemented these with a very extensive review of other direct and circumstantial evidence of the intent of the redistricters, evidence that is presented in full in Kousser, "How to Determine Intent," *supra*, n. XX, at 593-684.

[421]See Section II.3., *supra*.

[422]It is possible that some Justices, perhaps a majority, regard these as *a priori* truths, not subject to verification or falsification. If judges may simply assume any fact that justifies a policy, then a court may become a superlegislature guided only by political whim, and not even subject to factual demonstration.

[423]See Section II.2., *supra*. *U.S.* v. *Louisiana*, in which the State redrew a second black-majority district to have much more compact lines, offers an especially good opportunity for the Court to affirm this distinction.

the product of very mixed motives may be constitutional, and much in the opinion seems to require it.[424]

Fourth, even if it were to reject the first two arguments and get to strict scrutiny, the Court could rule that rectifying specific instances of past anti-minority racial gerrymandering or avoiding well-grounded suits under Sections 2 and/or 5 of the Voting Rights Act constituted sufficiently compelling state interests to justify the actions that the States took. Sections III and IV of this paper demonstrate at the very least that reasonable people could have believed such rectification necessary or such suits likely to succeed. Thus, these reasonable legislators need not have been motivated by any racial purpose whatsoever in drawing the districts at issue, but only by serious non-racial interests -- remedying past injustice and avoiding costly litigation. The Court would then have to clarify what it meant by narrow tailoring in a redistricting context. If it said that a redistricting plan that provided for a number of minority opportunity districts that was less than or equal to the proportion of minorities in the population or voting age population was legally unobjectionable, and that drawing districts containing a fairly high proportion of one minority group was necessary, because of continued racial bloc voting by whites, to attain that end, then all of the new southern districts would pass muster.

Fifth, the Court could set out specific compactness and segregation standards -- that is, it could give its constitutional blessing to one or a group of mathematical compactness indices and a specific level of minority percentage in district population that triggered constitutional doubt. Then, depending on the levels chosen, some districts would pass muster and others would not. On the other hand, the difficulty of reading specific threshold numbers into the Constitution might convince the Court to abandon *Shaw* as unmanageable or at least constitutionally unjustifiable.[425] In practice, *Shaw* imposes a difficult dilemma: If it does not require specific numerical standards, it invariably leads to subjective and unequal decisions on what is legal; if it does require, say, a "perimeter compactness score" of 0.10 and an African-American or Latino percentage of 55%, then where in the Constitution could such numbers be drawn from? In either case, *Shaw* is inevitably arbitrary and should be reconsidered on this ground alone.

All five paths away from *Shaw* require abandoning the ivory tower world of legalistic abstractions. With the retirement of Justice Byron White, the author of so many of the Court's voting rights decisions, a person of often "conservative" principle, but a Justice of relentless common sense

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[424]District lines that purposefully dilute the overall voting strength of minorities, as in the *Garza* case, *supra*, n. XX, should be held unconstitutional regardless of whether there were additional motives for drawing the lines because they represent a discrimination *against* a relatively powerless group.

[425]Cf. Justice O'Connor's denunciation of the "nebulous standard" adopted by the Court in *Davis* v. *Bandemer*, 106 S.Ct. 2797 (1986), at 2817.

on the topic of voting rights,[426] the ideal person on the Court to execute this realignment of legal theorizing with real world experience is the only Justice with experience in redistricting, the senior "moderate" Justice, former State Sen. Sandra Day O'Connor.

[426]White was the author of the opinion of the court in seven major voting rights cases -- more than any of his colleagues during his three decades on the Supreme Court: *Swann* v. *Adams*, 87 S.Ct. 569 (1967), *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971), *White* v. *Regester*, 412 U.S. 753 (1973), *Gaffney* v. *Cummings*, 93 S.Ct. 2321 (1973), *White* v. *Weiser*, 93 S.Ct. 2348 (1973), *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U.S. 144 (1977), and *Rogers* v. *Lodge*, 458 U.S. 613 (1982). In addition, he issued notable dissents against mechanical and inflexible applications of absolute population equality in *Wells* v. *Rockefeller*, 89 S.Ct. 1234 (1969) and *Karcher* v. *Daggett*, 103 S.Ct. 2653 (1983); against a clumsy and unwarranted application of intent requirements (requirements that White had introduced in *Washington* v. *Davis*, 426 U.S. 229 (1976)) in *City of Mobile* v. *Bolden*, 100 S.Ct. 1490 (1980); as well as in *Shaw* v. *Reno*.

TABLE 1: DIFFERENCES IN RACIAL ATTITUDES IN NORTH CAROLINA, 1993

Item	Percent With Attitude	
	White	Black
PANEL A: GENERAL BELIEFS ABOUT PREJUDICE		
race relations/discrimination an important problem	5	20
racial discrimination and prejudice today in N.C. very serious	17	37
prejudice and discrimination against blacks in N.C. more prevalent in 1993 than in 1980	17	36
agree very strongly that most whites in N.C. have prejudiced views	38	70
most whites in N.C. want to keep blacks down	13	40
PANEL B: DEGREE OF PRIVATE DISCRIMINATION TODAY		
whites have better chance in N.C.		
to get any job qualified for	19	70
any housing can afford	13	54
good education	9	38
blacks often treated more slowly or less politely in N.C. restaurants or retail stores	8	45
qualified blacks are denied jobs, scholarships	20	74
qualified whites lose out on jobs, scholarships	40	6

PANEL C: GENERAL BIAS IN GOVERNMENT PROGRAMS

local governments in N.C. favors whites over blacks	13	52
law enforcement in N.C. tougher on blacks	19	64
equal justice for minorities in N.C. is major problem	15	65
federal and state governments have done too much to help blacks achieve equality in the past 10 years	30	1
--too little	23	76

PANEL D: POLICY PREFERENCES

prefer local housing ordinances that permit discrimination	44	15
strongly oppose giving blacks preferred treatment in college admissions or employment	52	24
strongly favor busing schoolchildren for racial integration	4	26

Source: September-October, 1993 telephone sample of 403 whites and 409 blacks in North Carolina by Howard, Merrell and Partners of Raleigh, sponsored by Z. Smith Reynolds Foundation.

TABLE 2: STATISTICS FOR PARTY REGISTRATION REGRESSIONS

Year	*Intercept*	*Dem.*	*Rep.*	R^2
	PANEL A: PERCENTAGE OF VOTE FOR DEMOCRATS			
1980	-0.53(-1.41)	1.43(3.53)	0.25(.54)	.72
1982	-3.09(-.91)	3.91(1.15)	3.53(.91)	.49
1984	0.36(.47)	0.45(.61)	-0.60(-.59)	.70
1986	-1.06(-.68)	1.94(1.24)	1.11(.62)	.91
1988	1.05(.29)	-0.12(3.61)	-1.48(-.36)	.65
1990	0.01(.00)	0.92(.45)	-0.22(-.01)	.62
1992	3.81(2.93)	-3.00(-2.26)	-4.53(-3.03)	.88
	PANEL B: PERCENTAGE OF VOTE FOR REPUBLICANS			
1980	1.53(3.93)	-1.43(3.43)	-0.24(-.51)	.71
1982	3.41(1.36)	-3.31(-1.31)	-2.57(-.90)	.72
1984	0.63(.83)	-0.45(-.61)	0.60(.59)	.70
1986	2.06(1.33)	-1.94(1.24)	-1.11(-.62)	.91
1988	-0.05(-.01)	0.12(.03)	1.50(.36)	.65
1990	0.99(.49)	-0.92(-.45)	0.22(.10)	.62
1992	-2.66(-1.71)	2.81(1.78)	4.35(2.44)	.85

Notes: t statistics in parentheses.
Regressions are computed only for contested districts, which numbered 10 in 1980, 10 in 1982, 11 in 1984, 9 in 1988, and 11 in 1986, 1990, and 1992.

Sources: Votes from Richard Scammon, *et al.*, *America Votes*, relevant years. Registration computed from data provided by North Carolina Dept. of State and North Carolina General Assembly.

TABLE 3: PREDICTED AND ACTUAL WINNERS FROM PARTY REGRESSIONS

Election	*Democratic Winners*		*Republican Winners*		*% Correct*
	Predicted	*Additional*	*Predicted*	*Additional*	
1980	5	1	3	2	73
1982	9	0	1	1	91
1984	4	2	4	1	73
1986	6	2	2	1	73
1988	5	3	3	0	73
1990	5	2	4	0	82
1992	7	1	4	0	92

Source: Computed from Table 2

TABLE 4: PARTISAN EFFECTS OF REDISTRICTING PLANS PROPOSED IN 1991 AND 1992

Plan Name	*Predicted Democratic Seats Based on Regressions from Election of*		
	1988	*1990*	*1992*
	PANEL A: DEMOCRATIC PLANS		
Cong. Base Plan 1 (CB1)	7	9	7
CB2	7	8	7
CB3	7	8	7
CB4	7	7	7
CB5	7	7	7
CB6#(1991 Final)	7	9	7
Merritt/Rose/NAACP	8	8	8
CB7	7	7	7
CB8	7	7	7
CB9	7	8	7
CB10 (1992 Final)	7	8	7
	PANEL B: REPUBLICAN PLANS		
Justus, 1991	6	6	6
Justus, Compact 2-minority	6	6	6
Balmer 6.2	6	6	6
Balmer 7.8	6	6	6
Balmer 8.1	6	6	6
Balmer 9.1	6	7	6
Balmer 10.1	6	7	6
Flaherty	6	6	6
Hofeller	6	6	6

Source: Computed from Regressions in Table 2 and registration data from state Section 5 Submissions.

Fig. 1: Do White and Black Congressmen Differ in North Carolina?